Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

ANDREW POLICASTRO,
Petitioner,

v.

DR. THEODORA P. KONTOGIANNIS, Principal Tenafly High School; TENAFLY BOARD OF EDUCATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

ANDREW POLICASTRO
59 DAY AVENUE
TENAFLY, NJ 07670
(201) 568-0387

Petitioner Pro Se

April 22, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Does the First Amendment allow public school teachers to place a memo (private speech) in the teacher mailboxes?

2. Can a "plain vanilla" memo placed in the teacher mailboxes cause a "material and substantial disruption"?

3. Is a prior approval policy Constitutional (regarding teacher free speech in the teacher mailboxes) without any guidance on denial?

4. Can a pro se First Amendment lawsuit be moot for lack of damages when damages are clearly on the record but not in the original complaint?

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INTRODUCTION

My case affects 3,091,000 public school teachers in the United States.[1] As a public school teacher; the First Amendment protects my free speech (personal messages, memos, notes, cards, etc.,) in the teacher mailboxes. Teacher mailboxes are ubiquitous in public schools in the United States. U.S. mail is also placed in the teacher mailboxes. "The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker v. Des Moines School District, supra...*" *Perry Ed. Assoc. v. Perry Local Ed. Assoc.*, 460 U.S. 37, 44 (1983).

My case has been featured three times in the past three years by the National School Boards Association in their Legal Clips emails; so all the school board attorneys in the country know about this case. The *Tinker* standard is impressive as precedent, but the Third Circuit opined teacher complaints about a "plain vanilla" memo in the teacher mailboxes reach the high *Tinker* standard. Then there is no more *Tinker* standard. During the bench ruling, the District Court called the memo "plain vanilla". (Tr. 208:17).

This case involves (1) clear conflict between the Third Circuit and other circuits, (2) clear conflict between the Third Circuit and the Supreme Court of California, and (3) clear conflict between the Third Circuit and the Supreme Court. Most of all, this case defies common sense.

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[1] Digest of Education Statistics, 2006, Table 4, p. 16.

My case is about a "plain vanilla" memo placed in the teacher mailboxes. The memo, "Questions for the Tenafly Negotiation Team", was placed in the mailboxes on March 13, 2002. App. 50a, 51a. The memo was signed by 13 Tenafly High School teachers. Other teachers were offended by the content/viewpoint of the memo and complained to the principal and in turn the principal removed all the memos from the mailboxes. The memo was again placed in the teacher mailboxes and again other teachers complained to the principal and she again removed the memos and then directed the mailroom locked till the ratification vote was taken.

I have taught at three different high schools in New Jersey and in all those schools, as well as in the two cases to reach the Supreme Court of the United States concerning teacher mailboxes (*Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37 (1983) and *Texas State Teach. Assn. v. Garland Indep. Sch. Dist.*, 777 F.2d 1046 (5th Cir. 1985), aff'd, 479 U.S. 801 (1986)) personal messages between and among the teachers are allowed to be placed in the teacher mailboxes without administrative permission.

My case follows black letter law, specifically the *Tinker* standard. My pro se trial brief was complimented on by two Supreme Court experts (Prof. Tribe and Prof. Gressman). App. 57a-60a.

While waiting 20 months for the recent (Jan. 24, 2008) opinion, Tenafly's school superintendent, relying on the school mailbox/school email policy, suspended (for four months) my email use and use of the computers at school for replying to his email, which

asked, "So, how do we move ahead?" App. 63a-67a. I hit "reply to all" and answered his email. App. 61a-63a. I was officially reprimanded and my next step for misuse of the school mailbox/school email policy will probably be suspension or removal. App. 68a, 69a.

Seven months after this court reaffirmed that *Tinker* is still the standard for student and teacher First Amendment rights in *Morse v. Frederick,* 127 S. Ct. 2618 (2007); the Third Circuit reaffirmed that "plain vanilla" speech which offends other teachers can be removed. Censoring "plain vanilla" speech which offends other teachers "is antithetical to the First Amendment and the form of self-government that it was intended to foster." Justice Alito, dissenting, *C.H. v. Oliva*, 226 F.3d 198, 214 (3rd Cir. 2000).

OPINIONS BELOW

All four unpublished opinions (two Circuit and two District, and rehearing and en banc denial April, 2005) are in the Appendix. App. 1a-49a.

JURISDICTION

The Third Circuit rendered its decision on January 24, 2008.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

During the morning of March 13, 2002, a memo (Questions for the Tenafly Negotiation Team), signed by thirteen teachers, was placed in the teacher mailboxes by Mr. Golde, a Tenafly High School teacher, and was removed by Dr. Kontogiannis, Principal of Tenafly High School. App. 50a, 51a. The memo was again placed back in the mailboxes and was again removed under the authority of Dr. Kontogiannis. The mailroom was then locked for the rest of that school day under the authority of Dr. Kontogiannis. March 13, 2002 was ratification day for the teachers' contract. The ratification vote occurred after school in the Tenafly High School auditorium.

The teacher mailboxes at Tenafly High School are used for personal messages, holiday cards, birthday cards, gifts, fliers from local merchants, memos from teachers, notes from teachers, notes from parents, notes from students, U.S. mail, union information and administrative concerns.

Two months later, a building rep and I had a meeting with the principal concerning the removal of the memo on March 13, 2002. "You had a meeting with me and I indicated to you ...if anyone had asked me for permission, I would have said yes. There is no reason for me to have said no, that this could not have been placed in the mailbox... (Tr. 138:6).

The memo that was removed from the mailboxes on March 13, 2002 was not obscene, was not disruptive, not inappropriate, did not involve the students in any way, did not in any way carry the imprimatur of the school, and did not involve class or instructional time. The memo was quintessential speech.

A "plain vanilla memo" was signed by 13 public high school teachers who wanted to express an opinion and placed quietly and without incident in the teacher mailboxes. The memo was removed because other teachers in the building were offended by the contents of the memo and complained to the principal about the memo. "To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint." *Child Evangelism of N.J., Inc. v. Stafford Twp. Sch. Dist.*, Justice Alito, 386 F.3d 514, 527 (3rd Cir. 2004). The district court's two rulings and the Third Circuit's January, 2008 ruling turned the *Tinker* standard and First Amendment jurisprudence on its head.

My rare pro se win in January, 2005 had many *Tinker* quotes and references. App. 31a-40a. The rehearing en banc denial vote included Justice Alito.[2] App. 32a. This case is *Tinker* for teachers. The *Tinker* case was mentioned eight times in the January 12, 2005 Third Circuit opinion. The *Tinker* case was never mentioned in the January 24, 2008 Third Circuit opinion.

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[2] The record does not reveal how Justice Alito (then Judge Alito) voted.

The Third Circuit opinion of January 24, 2008 spent much time and energy (about half the opinion) regarding mootness because Chief Judge Scirica stated I did not ask for damages. I clearly asked for damages. App. 53a-56a. The ten million in damages was also discussed at the August 1, 2005 settlement hearing in chambers, which was also transcribed. I never wanted any money from this lawsuit. I did not know how to ask for one dollar in nominal damages. I thought that if I asked for $1 and Tenafly sent me a check for $1 the lawsuit would be over. App. 53a-56a.

REASONS FOR GRANTING THE WRIT QUESTIONS ONE AND TWO

According to the trial testimony about ten non-school related items were placed in each teacher's mailbox per month without administrative permission. There are approximately 100 teacher mailboxes at Tenafly. So 10 times 10 months = 100 per year per mailbox, or 800 per mailbox in the 8 years Dr. Kontogiannis has been principal. Why was this one memo removed out of the 800 non-school related items placed in each teacher's mailbox without administrative approval? One memo out of 800 in her eight years as principal?

Content and viewpoint regulation insult the core of the First Amendment.

From the trial:

> The Court: ...it wasn't the content of the memorandum or the document that created this dispute.

> Mr. Policastro: It absolutely was the content of the memo.
>
> The Court: It wasn't. She said it wasn't the content. There wasn't anything offensive, vulgar or unreasonable about the content of the memorandum. It was the affect of the memorandum which caused her to do what she did ...

(Tr. 160:4).

("Listeners reaction to speech is not a content-neutral basis for regulation.") *Saxe v. State College*, Justice Alito writing for the court, 240 F.3d 200, 209, (3rd Cir. 2001). I believe the word "affect" should have been transcribed as "effect". (Tr. 160:11).

"Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 134, (1992). "Speech cannot . . . be punished or banned, simply because it might offend" those who hear it." *Id.* at 134-35.

"The Supreme Court has made it clear, however, that the government may not prohibit speech under a "secondary effects" rationale based solely on the emotive impact that its offensive content may have on a listener..." *Saxe* at 209. The effect of the "plain vanilla" memo does not trump the *Tinker* standard.

The District court ruled the memo was "plain vanilla" and "was not lude, vulgar, obscene or inflammatory..." (Tr. 208:17). The Third Circuit

stated, "The Memo does not contain lewd or vulgar statements." *Policastro v. Kontogiannis, et. al.*, Civ. Act. No. 04-2883, 2005 WL 1005131, at *2, slip opinion at 5, (3rd Cir.(N.J.) Jan.12, 2005, en banc rehearing denied April 12, 2005).

Incredibly, even the defendant, Dr. Kontogiannis, concurred:

> (1) "...I don't think there's anything in here that is obscene or vulgar..." (Tr. 135:23);
>
> (2) "I don't see anything in here personally that I'm offended by, but evidently other people were offended by the content of this memo." (Tr. 136:5);
>
> (3) "There's nothing in this memo that I find inappropriate." (Tr. 139:5).

So why was it removed? Because other teachers complained about the content/viewpoint of the "plain vanilla" memo.

So hundreds and hundreds of items and memos are placed in each teacher mailbox every year and this one memo is removed? The removal of the memo was unequivocally textbook content/viewpoint regulation and thus flagrantly unconstitutional. The District Court erred by ruling, "As a result, I conclude as a matter of law that there has been demonstrated by Tenafly a specific – there has been demonstrated by Tenafly that a significant disruption did occur..." (Tr. 209:4).

"You had a meeting with me and I indicated to you ...if anyone had asked me for permission, I would have said yes. There is no reason for me to have said no, that this could not have been placed in the mailbox... (Tr. 138:6).

This defies logic! The defendant stated that she would have said yes, if a teacher asked her, for permission to place the "plain vanilla" memo in the teacher mailboxes. Everybody used the mailboxes without permission. The removal of the memo was selective enforcement of an unconstitutional policy and clearly censorship.

From the January, 2006 trial:

> The Court: "There is no dispute that the teachers' mailboxes were apparently available to every teacher, every person in the school to convey materials of every conceivable description." (Tr. 23:5).

The recent Third Circuit opinion of this case conflicts with The Supreme Court in many cases including, *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

"In *Tinker*, this Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U.S., at 506." *Morse* at 2626. Chief Justice Roberts opined:

> *Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and

substantially disrupt the work and discipline of the school." *Id.*, at 513. The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." *Id.*, at 514. Political speech[Policastro's memo], of course, is "at the core of what the First Amendment is designed to protect." *Virginia v. Black*, 538 U.S. 343, 365, (2003). The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." *Tinker*, 393 U.S., at 509, 510. That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance." *Id.*, at 508. *Morse* at 2626.

Justice Alito and Justice Kennedy concurring in *Morse* did not sparse words that *Morse* is their limit:

"I join the opinion of the Court on the understanding that...(b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue..." *Id.* at 2636. Justice Alito continued, "The Court is also correct in noting that *Tinker*, which permits the regulation of student speech that threatens a concrete and "substantial disruption," *id.*, at 514." *Id.* at 2637.

To make crystal clear, Justice Alito writes, "I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions." *Id.*

Justice Alito opined about the limit of student[teacher] speech in public schools: "The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment." *Id.* "But I regard such regulation as standing at the far reaches of what the First Amendment permits. I join the opinion of the Court with the understanding that the opinion does not endorse any further extension." *Id.*

The memo caused discussion and some teachers talked in the hallways and two secretaries chatted in the library. Let's shut down the entire school and fire all those teachers who were seen talking! It is a school, sometimes teachers are allowed to talk! Maybe the students can talk too!

Justice Alito opined in *Saxe* at 212, "Noting that the only evidence was the objection of several other students, the court observed that "[I]f school officials were permitted to prohibit expression[the memo] to which other students[teachers] objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression." *Saxe v. State College*, 240 F.3d 200, (3rd Cir. 2001). This is exactly what happened on March 13, 2002 in Tenafly

High School. Teachers complained about the "vanilla" memo and the principal removed the memos. If the "plain vanilla" memo of this case can be legally removed, then teachers throughout the United States are not protected by the *Tinker* standard.

Reaction to speech is not viewpoint neutral. The memo was not disruptive, lude, or vulgar. Unusual or inappropriate reaction to a "vanilla" memo or "vanilla speech" does not give the government or a school administrator the right to censor appropriate speech. "The school's proper response is to educate the audience rather than squelch the speaker." *Hedges v. Wauconda Comm. Unit Sch. Dist.* 9 F.3d 1295, 1299 (7th Cir. 1993). "The school's proper response is to educate the audience rather than squelch the speaker. *Hedges*." *Saxe* at 214. "The police must permit the speech and control the crowd; there is no heckler's veto. *Collin v. Smith,* 578 F.2d 1197 (7th Cir. 1978). Cf. *American Booksellers Ass'n v. Hudnut,* 771 F.2d 323 (7th Cir. 1985), affirmed without opinion, 475 U.S. 1001 (1986)." *Hedges* at 1299.

> Mr. Policastro: ...A prior restraint, this prior approval is a prior restraint and these aren't the Pentagon Papers, your Honor. This is a plain memo and there wasn't a single thing wrong about what was on this memo, and anyone that reacts inappropriately to something so appropriate, that's the problem.
>
> The Court: That's your opinion.
>
> Mr. Policastro: Absolutely.

> The Court: That's your opinion and it has nothing to do with the issue in the case. (Tr. 183:16).

In fact, is this not the crux of the case? "I must also mention the incongruity of prohibiting speech because others respond to it with violence." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1195 n.5 (9th Cir. 2006) (Kozinski, J., dissenting). Teachers complained to the principal. So what! Judge Kozinski would also probably say, "So what?" "School authorities have far less latitude to ban speech that does not interfere with learning situations." *Id.* at 1194. The "vanilla" memo of this case unequivocally did "not interfere with learning situations." *Id.*

"Politics, sports, movies, music and personal matters are the ordinary subjects of discourse in high school corridors and lunch rooms." *Id.* The memo in the teacher mailboxes did not involve the classroom or the students at all. "Occasionally such discussions can become heated, but so long as they don't escalate into violence or the threat of violence, and do not otherwise interfere with school operations, they cause no disruption of the school environment." *Id.*

> *Tinker v. Des Moines Independent Community District* is the most important Supreme Court case in history protecting the constitutional rights of students [teachers]. The decision is perhaps best remembered for its stinging pronouncement: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This

> sentence powerfully conveys schools are not institutions immune from constitutional scrutiny: students[teachers] retain their constitutional freedoms even when they cross the threshold into the school." Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 Drake L. Rev. 527 (2000).

It is obvious from the trial testimony that Tenafly High School is not used to free speech among the teachers. We are isolated in different departments. I have personally gone for months without seeing other teachers because of the departmentalized structure of the school.

"The burden is on the school to prove the need for restricting student speech and the standard is a stringent one: there must be proof that the speech would "materially and substantially" disrupt the school." *Id.* at 532-533. Professor Chemerinsky's article is from the Drake Law Review, Constitutional Law Symposium, in 2000 featuring the *Tinker* case.

> Finally, and most importantly, there is a key role for the judiciary to play in protecting student[teacher] speech. School officials - like all government officials - often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech. Yet, subsequent cases rarely follow this

approach. Instead, they proclaim the need for deference to the authority and expertise of school officials. Few cases, though, involve instances where school authority must be deferred to for the sake of authority and even fewer concern expert decisions by school officials.

Justice Black's dissent in *Tinker* is an angry polemic against according students First Amendment rights. Unfortunately, his position and not that of the seven Justices in the majority seems to have triumphed. Simply put, thirty years after *Tinker*, students[teachers] do leave most of their First Amendment rights at the schoolhouse gate. *Id.* at 546.

The principal testified staff members were offended by the "vanilla memo" and she concluded that it caused a disruption. The *Tinker* standard is very high and very clear. A "vanilla memo" that offends some does not even come close to the threshold of the *Tinker* standard. "The burden is on the school to prove the need for restricting student[teacher] speech and the standard is a stringent one: there must be proof that the speech would "materially and substantially" disrupt the school." Chemerinsky at 533.

The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it. See *Tinker*, 393 U.S. at 509, (school may not prohibit speech based on the "mere desire to avoid the

discomfort and unpleasantness that always accompany an unpopular viewpoint"). *Saxe* at 215.

From *Saxe* on page 209, "As the Supreme Court has emphatically declared, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989)." Justice Alito likes this quote so much he repeats the exact quote again in *Saxe* on page 215, "If there is a bedrock principle underlying the First Amendment, it is that the government[school administration] may not prohibit the expression[memo] of an idea simply because society[other teachers] finds the idea offensive or disagreeable."

It was a "plain vanilla" memo. Not one of my witnesses testified that they complained to the principal about the memo. Even if every teacher in the school complained about the memo, it would not matter. Case law clearly protects speech that others find offensive or disagree with. Again from *Saxe* at 215, 'Nor could the University proscribe speech simply because it was found to be offensive, even gravely so, by large numbers of people." Citing *Doe v. Michigan*, 721 F.Supp. 852, 863 (1989).

The District Court was clear, "There is no dispute that the teachers' mailboxes were apparently available to every teacher, every person in the school to convey materials of every conceivable description." (Tr. 23:5)

In a case involving high school student demonstrations inside the school which did cause substantial disruption, Chief Judge Lord of the U.S. District Court for the Eastern District of Pennsylvania did not parse words. "In deciding this issue, we believe that the courts can only consider the conduct of the demonstrators and not the reaction of the audience." *Gebert v. Hoffman*, 336 F. Supp. 694, 697 (1972). Teachers complained about the "vanilla" memo and the principal of Tenafly High School censored speech by removing the memo from the teacher mailboxes. The teachers who complained were "the audience"; the teachers who signed the memo and peacefully placed it in the teacher mailboxes were the "demonstrators". It was a "vanilla" memo, it was quintessential speech. The memo was not disruptive, lude, vulgar or inflammatory. The memo should have incredible First Amendment protection.

Justice Alito seems to agree that the *Tinker* standard is high. "The precise scope of *Tinker's* "interference with the rights of others" language is unclear; at least one court has opined that it covers only independently tortuous speech like libel, slander or intentional infliction of emotional distress." *Saxe* at 217. "Therefore, if the expression of a particular religious viewpoint, such as one espousing racial hatred, creates a sufficient threat, school authorities may intervene." *C.H. v. Oliva* at 211 (3rd Circ.), Justice Alito. This is the kind of speech that reaches the high Tinker threshold; not a "vanilla" memo in the teacher mailboxes.

The "plain vanilla" memo of this case was not disruptive. Other teachers who also complained about

the memo were not disruptive. Two secretaries who were talking in the library about the memo while a student had to wait a minute to get help were also not disruptive.

Two weeks after the *Tinker* decision, Justice Fortas, who wrote the *Tinker* decision, denied cert in a First Amendment case, *Barker v. Hardway*, 394 U.S. 905, March 10, 1969. Justice Fortas wrote:

> I agree that certiorari should be denied. The petitioners were suspended from college not for expressing their opinions on a matter of substance, but for violent and destructive interference with the rights of others. An adequate hearing was afforded them on the issue of suspension. The petitioners contend that their conduct was protected by the First Amendment, but the findings of the District Court, which were accepted by the Court of Appeals, establish that the petitioners here engaged in an aggressive and violent demonstration, and not in peaceful, nondisruptive expression, such as was involved in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503. The petitioners' conduct was therefore clearly not protected by the First and Fourteenth Amendments. *Id.*

Justice Fortas was clear in *Tinker* and clear two weeks later; *Tinker* is about the speaker's conduct in school while expressing their First Amendment rights. *Tinker* does not protect a heckler's veto.

The memo was placed in the teacher mailboxes without disruption, noise or any interference at all with classroom instruction. Teachers who disagreed with, or were offended by the "vanilla" memo could have just thrown it out. They did not have to read it. They could have written a response to the memo and placed it in the teacher mailboxes. "As we shall discuss, the wearing[distribution] of the armbands[memo] in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech" which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Tinker* at 505.

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this court for almost 50 years. *Id.* at 506.

Where do teachers have First Amendment rights in their schools? Case precedent has made it clear that teachers do not have academic freedom in their classrooms. The hallways are full of students. I would not dare interrupt a teacher during class time to pass out a memo. It is self evident that the teacher mailboxes can, and should be used by the teachers to communicate with each other. Be that with 1, 10, 20 or all 100 teacher mailboxes in Tenafly High School.

"The problem poised by the present case...does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech"." *Id.* at 507-508. The *Tinker* case and the case at bar are practically identical. Except, we did not interfere with the classroom. Our case is actually much stronger! Class instruction was not hindered at all by placing the memo in the teacher mailboxes. This case was not only selective enforcement of an unconstitutional policy and content/viewpoint discrimination by other teachers via the principal, but it was clearly censorship!

> The school officials banned and sought to punish petitioners for a silent, passive expression[memo] of opinion, unaccompanied by any disorder or disturbance on the part of the petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students[teachers] to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students[teachers]. *Id.* at 508.

My case fits almost perfectly into all these quotes from Tinker. "Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises". *Id.* Inappropriate reaction to speech (oral or written) does not allow the school administration to silence the speaker by removing the memos from the teacher mailboxes.

> "One must begin with the premise that government may not justify the suppression of speech because its content or mode of expression is offensive to some members of the audience. If, as Holmes observed, "every idea is an incitement," the duty of the police ordinarily must be to protect the speaker's right of expression—whatever the reaction." American Constitutional Law, Laurence Tribe, p. 852, 2nd Ed., 1988.

Dr. Kontogiannis, principal on cross-examination:

> "...[T]here were other people who found this particular memo offensive and I might add that I don't think there's anything in here that is obscene or vulgar..." (Tr. 135:22). "I don't see anything in here personally that I'm offended by, but evidently other people were offended by the content of this memo". (Tr. 136:5).

"Material and substantial disruption" comes from the "clear and present danger" threshold from previous free speech cases before *Tinker*.

> This premise emerges most clearly in the classic opinion of Justice Brandeis, joined by Justice Holmes, concurring in *Whitney v. California*: "...no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.

Only an emergency can justify repression". Tribe at 844.

There was no emergency at Tenafly High School on March 13, 2002, there was just a "plain vanilla" memo signed by 13 teachers which expressed an opinion. Instead of dialogue the teachers who felt threatened by the memo ran to the principal many times that morning. The trial record shows that many of the alleged complainers were, ironically, union building reps for the high school, people who were supposed to protect teacher rights and instead chose to cowardly complain about a memo that pointed out weakness in the contract to be voted upon that day. There was no emergency caused by the memo. Teachers could have just read the memo and thrown it in the garbage. They also could have written a response to the memo and placed the response in the mailboxes.

Tenafly never mentioned "substantial disruption" or "disruption" caused by the memo in their first four briefs to the federal courts. I have used the *Tinker* standard as the basis of my legal argument from the start.

"...[G]overnment will ordinarily defend a restriction on free expression by reference to some danger beyond the speech itself..." Tribe at 794.

"And if the constitutional guarantee is not to be trivialized, it must mean that government cannot justify restrictions on free expression by reference to the adverse consequences of allowing certain ideas or information to enter the realm of discussion and awareness." Tribe at 790. The district court erred by

concluding the memo caused a significant disruption. The memo caused discussion as it was meant to. Some students had to wait in the library because two secretaries were chatting about the memo? This is so trivial that it does not warrant any further comment. Teachers were in the hallways talking about the memo? Again, there is no evidence that those teachers were not on their free periods while conversing.

"Regulations on the speech of those who teach within the schools obviously must be drawn more narrowly than regulations on speech of outside representatives". *Texas State Teach. Assn. v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1053 (5th Cir. 1985), aff'd, 479 U.S. 801(1986). Teacher rights are greater than student rights.

> *Perry*, which concerns the rights of organizations outside the schools, does not apply to teacher communication within the school. See *Country Hills*, 560 F.Supp. at 1215, 1220; see also *Hastings v. Bonner*, 578 F.2d 136, 143 (5th Cir. 1978) ("[T]here is no doubt that this circuit has adopted and now applies the *Tinker* test in cases involving the First Amendment rights of teachers."). The *Tinker* test comes from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which held that teacher communications may be suppressed only when "the expression or its method of exercise materially and substantially interferes with the activities or discipline of the school". *Texas State Teach. Assn. v. Garland Indep. Sch. Dist.*, 777

F.2d 1046, 1053 (5th Cir. 1985), *aff'd*, 479 U.S. 801 (1986).

The Tenafly teacher mailbox policy fails the *Tinker* test.

"The primary purpose of GISD's[Garland Indep. Sch. Dist.'s] internal mail system is to distribute official messages between school administrators and teachers and among the teachers themselves. GISD allows teachers to communicate with each other on any subject, including purely personal matters, except for subjects relating to employee organizations". Id at 1055. The use of the internal mail system by the teachers in Garland allows all personal messages, memos, notes, cards, etc. to be placed in the teacher mailboxes without administrative approval. "Teachers who have access to school media facilities for even purely personal matters cannot be prohibited from the exercise of that right simply because their internal speech may concern "employee organizations"." *Id.*

"In addition, teachers use the system to send personal messages...". *Perry Ed. Assn. v. Perry Local Ed. Assn.*, 460 U.S. 37, 39 (1983). "Because the contractual prohibition extends only to competing unions, PEA's letters and broadsides are not the only unofficial communications permitted to flow through the internal mail system. Teachers use the system to send purely personal messages". *Perry Local Ed. Assn. v. Holt*, 652 F.2d 1288, 1288 (7th Cir. 1981). Both teacher mailbox cases to reach the Supreme Court, *Perry* and *Texas State Teachers*, allowed personal communication between teachers in the teachers' mailboxes without approval by the administration.

The memo that was removed from the mailboxes on March 13, 2002 was not obscene, was not disruptive, not inappropriate, did not involve the students in any way, did not in any way carry the imprimatur of the school, and did not involve class or instructional time.

In 1970, in *Friedman v. Union*, 314 F.Supp. 223, a N.Y. District Court ruled that a school mailbox policy was unconstitutional and especially noted that U.S. mail was distributed in the teacher mailboxes. U.S. mail is also placed in the Tenafly teacher mailboxes, just like it is placed in all teacher mailboxes throughout the United States.

"The rights of students under the First Amendment should be afforded, as well, to teachers. *Tinker*, supra, recognized this principle when the Supreme Court said that neither 'students (n)or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' 89 S.Ct. at 736." *Friedman* at 228.

Parenthetically, it is interesting to note that the present Board policy permits any mailed item to be distributed through the faculty mailboxes. The entire Board rationale is undermined by that interpretation of 11F-21. It can hardly be argued that the fear of litter and/or disturbance is any less by the requirement that literature come into the school enclosed in an envelope or wrapper bearing a postage stamp. As to such mail the Board is not burdened with a censorship function since all such mail is placed directly in the appropriate faculty mailbox. The court has refrained from going off on this

> ground for the very reason that, even if the Board were to revise its present policy by not permitting mailed items to be placed in the faculty mailboxes, 11F-21 would still fall as an unwarranted prohibition of free speech rights which the Board may not deny to its teachers.
>
> The court finds that 11F-21 is void on its face and in its application as an overbroad prohibition of the First Amendment rights of the public school teachers in the District. *Id.*

In my trial brief and briefs before both panels in the Third Circuit (2005 and 2008), I argued the memo was also protected as a letter under the "Letter of the Carrier Exemption". 39 C.F.R. § 310.3(b)(1) states, "The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them." 39 C.F.R. § 310.1(a) defines a letter, "A letter is a message directed to a specific person or address and recorded in or on a tangible object..." In the case at bar, the memo[letter] was delivered specifically to the Tenafly High School teacher mailboxes by one of the thirteen signatories. "The sending or carrying of letters is permissible if they are sent by or addressed to the person carrying them." *Regents v. PERB*, 485 U.S. 589, 601. The memos did not have to be enclosed in an envelope to be considered mail under the Code of Federal Regulations. The letters of the carrier exemption allowed the memos to be placed in the teachers' mailboxes. The removal of the memos[letters] by, or under the authority of the principal of Tenafly High School violated 39 C.F.R. § 310.3(b)., letters of the carrier exemption of the private express statutes.

The removal of letters[memos] comes under 18 U.S.C. § 1708, "Theft or receipt of stolen mail matter generally". "Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter[memo], postal card, package, bag, or mail, or any article or thing contained therein, which has been stolen, taken, embezzled, or abstracted, as herein described, . . . taken, embezzled, or abstracted- Shall be fined under this title . . ." 18 U.S.C. § 1708 par.3. It is undisputed that the memos were removed by, or under the authority of the principal of Tenafly High School. The memos are letters under 39 C.F.R. § 310.1(a) and are protected under 39 C.F.R. § 310.3(b) and 18 U.S.C. § 1708.

During the trial, I stated:

> If I am a wealthy person and I have a memo like this and I feel like putting a 39 cent stamp and I cross it out, there is no way on earth that someone's going to remove that memo. So, thus, if I have the money, maybe we should have suggested this, but I didn't know all this, so if I place a stamp on this memo and I cross it out and I place it in those mailboxes, no one's going to remove it because now it's U.S. mail. Even though I deliver it, it's U.S. mail. That's the argument. If I want to spend – if there's 100 teachers and I have $39, I can get any memo going, so somebody else has a little extra money, they're allowed to communicate in the Tenafly mailboxes. I can get a stamp from the post office and stamp, stamp, stamp. You got your memo removed. I have $39 to spend, that communication's going in. (Tr. 181:23)

If the Supreme Court does not agree with the "Letter of the Carrier Exemption", a wealthy teacher who has the extra $41 dollars (postage has gone up, soon to be $42) can place a first class stamp on the memo, cancel the stamp with a pen, and then place the memos in the 100 mailboxes at Tenafly High School. It is incomprehensible that if a teacher expended this $41 then memos so stamped could not be removed. Free Speech is not so free!

The January, 2008 Third Circuit opinion of this case conflicts with a teacher free speech case in the Supreme Court of California from June, 1969 regarding the rights of teachers to distribute a petition in school. The California Supreme Court in *Los Angeles Teachers Union v. L.A. Board of Education*, 71 Cal. 2d. 551 (1969) ruled in favor of the teachers. From that opinion:

> The government has no valid interest in restricting or prohibiting speech or speech-related activity simply in order to avert the sort of disturbance, argument or unrest which is inevitably generated by the expression of ideas which are controversial and invite dispute. The danger justifying restriction or prohibition must be one which "rises far above public inconvenience, annoyance, or unrest." (Terminiello v. Chicago, 337 U.S. 1, 4.) This is so because the free expression of ideas concerning controversial matters is essential to our system of government. "[It] is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. . . .

> "Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." (*Id.*) As Mr. Justice Brandeis recognized, to avert violence and to preserve stable government there must be "the opportunity to discuss freely supposed grievances and proposed remedies." (Concurring opinion in *Whitney v. California*, 274 U.S. 357, 375). *L.A. Teachers* at 558.

"The months of negotiations over the proper level of compensation for teachers at the Wyoming Valley West[Tenafly] High School were unquestionably a matter of public concern, and respondents were clearly engaged in debate about that concern." *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001). Thirteen Tenafly teachers expressed an opinion about the negotiations. "That debate may be more mundane than the Communist rhetoric that inspired Justice Brandeis' classic opinion in *Whitney v. California*, 274 U. S., at 372, but it is no less worthy of constitutional protection." *Id.*

Justice Stevens would surely agree that the teacher negotiations at Tenafly High School were also "unquestionably a matter of public concern, and respondents[the 13 Tenafly teachers who signed the memo] were clearly engaged in debate about that concern." *Id.*

"Tolerance of the unrest intrinsic to the expression of controversial ideas is constitutionally required even in the schools." *L.A. Teachers* at 559.

> "[P]laintiffs have not only the right to discuss with fellow teachers issues such as those raised in the petition but also the more specific right to engage in such discussions in faculty rooms and lunchrooms during duty-free periods. Plaintiffs also have the right to "speak out freely" on such issues, which encompasses the right to communicate effectively. (Compare *Pickering v. Board of Education*, supra, 391 U.S. 563, 572) *Id.* at 560.
>
> Therefore, even if the findings be given their widest interpretation they are insufficient as a matter of law. Defendants have failed to demonstrate the existence of "facts which might reasonably have led [them] to forecast substantial disruption of or material interference with school activities" (*Tinker v. Des Moines Independent Community School Dist.*, supra, 393 U.S. 503, 514, italics added) as a result of plaintiffs' proposed activity. Rather, defendants have shown only that they reasonably apprehended the sort of unrest which inevitably results from the expression of controversial views but which must be tolerated in the schools as well as in society generally. In addition, they have produced speculative opinion testimony suggesting at most that plaintiffs' proposed activity may produce insubstantial and immaterial interruptions and

> disturbances of teachers working in lunchrooms and faculty rooms. *Id.* at 563.

"In the present case, plaintiffs' proposed conduct clearly falls within the desirable category of political activity... Absent a showing of a clear and substantial threat to order and efficiency in the schools, such proposed First Amendment activity should not be stifled." *Id.* at 565.

From the Third Circuit opinion, January, 2005, "The memo contained five questions regarding the negotiation of the Tenafly teachers' contract." App. 36a. In sharp contrast, the Third Circuit January, 2008 panel described the memo as a "labor dispute". App. 2a. "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution." *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940).

"Even in a nonpublic forum, however, where the greatest restrictions are permissible, "viewpoint discrimination" is not allowed unless it passes the highest scrutiny." See, e.g., *Lamb's Chapel v. Center Moriches Union Free School Distric*t, 508 U.S. 384, 394-95." *C.H. v. Oliva*, 226 F.3d 198, 210, Justice Alito dissenting en banc (3rd Cir. 2000). Removing the memos in this case because others complained is textbook content/viewpoint discrimination. "As Justice Brennan put it in *Perry*: "Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'" *Perry*

Education Assn., 460 U.S. at 62 (Brennan, J., dissenting)." *Id.*

"The panel's view is radically at odds with fundamental First Amendment principles. As previously discussed, viewpoint discrimination strikes at the heart of the freedom of expression. And in order to restrict core First Amendment speech, much more is needed than the possibility that the speech may cause resentment." *Id.* at 213.

The ACLU-NJ and Student Press Law Center submitted an amicus brief in support of my case to the Third Circuit in April, 2006. The ACLU-NJ also gave oral argument in January, 2007. On the brief was Jeanne LoCicero of the ACLU-NJ. The complete brief is still available online at http://www.aclu-nj.org/legal/legaldocket/policastrovkontogiannis.htm

From the ACLU-NJ and SPLC brief in support of my case: "Simply put, in the current case, the level of disruption contemplated by the *Tinker* Court to warrant a restraint of speech did not occur." Amicus at 11. Finally, somebody besides myself looked at the "plain vanilla" memo and the transcript of this case and stated what any reasonable jury would also conclude; as a matter of law the "vanilla" memo did not and could not cause a material and substantial disruption.

> *Tinker* and its progeny, however, clearly demonstrate that talking in halls and in the library does not rise to the level of disruption that justifies a deprivation of the Plaintiff's First Amendment rights. As this Circuit has

> explained the *Tinker* standard, regulation of speech "is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 211 (3d Cir. 2001). Amicus at 11.

If the memo of this case is not protected by *Tinker*, then there is no *Tinker* standard in the Third Circuit. "In the present case, the district court found less disturbance than occurred in *Tinker* and other cases in which restrictions on speech were found unconstitutional. Indeed, it found significantly less than the type of events that would rise to a substantial disturbance as a matter of law." Amicus at 15.

> The events of March 13, 2002, clearly do not amount to a substantial disruption as is required by *Tinker* and the law of this circuit. The discussions that took place in the halls and library were far less disruptive than the facts before the *Tinker* court such as the "wrecked lesson" and students who were not on task. These facts demonstrate that the memo did not create anything more than the discomfort of certain fellow teachers. Discomfort and objections, however, do not justify the suppression of speech. *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Township School District*, 386 F.3d 514, 528 n.9 (3d Cir. 2004) (noting that schools cannot justify the suppression of speech merely because it is "controversial.") Therefore, Defendants impermissibly removed the memo and violated

the expressional rights of Mr. Policastro. Amicus at 17.

QUESTION THREE

> A statute[school policy] may withstand an overbreadth attack "only if, as authoritatively construed..., it is not susceptible of application to speech...that is protected by the First and Fourteenth Amendments." *Goodling v. Wilson*, 405 U.S. 518, 520 (1972). If the ordinance[school policy] applies to appellant's activities[use of teacher mailboxes] and if appellant's activities[memo] are constitutionally protected, then the ordinance[school policy] is overly broad, and thus, unconstitutional". *Grayned v. City of Rockford,* 408 U.S. 104, 124 (1972).

Thus, the Tenafly mailbox policy is unconstitutional.

The teacher mailbox prior approval policy is unconstitutional. It is clearly a prior restraint on free speech. I should not have to ask permission to place a memo in the teacher mailboxes, whether I am placing items in 5, 25 or all 100 teacher mailboxes.

QUESTION FOUR

I clearly asked for damages. App. 53a-56a. The ten million in damages was also discussed at the August 1, 2005 settlement hearing in chambers, which was also transcribed. I never wanted any money from this lawsuit. I did not know how to ask for one dollar in nominal damages. I thought that if I asked for $1 and

Tenafly sent me a check for $1 the lawsuit would be over. App. 53a-56a.

PLAIN ERROR

The recent Third Circuit opinion stated, "One complaint reported a "commotion in the library" over the memorandum, and another reported arguments among teachers." App. 2a. The trial record revealed that the "commotion in the library" was two secretaries talking. The statement "arguments among teachers" is confusing to me. I could not find any reference to "arguments" in any briefs or anywhere in the trial record. There were no arguments at all. From the actual memo, "(5) What was the negotiating team's original proposal to the Board?" App. 51a. Arguments, because of this "plain vanilla" memo? It simply is not in the record. Neither is any "material and substantial disruption".

"I remember Leonard's [Judge Garth's] teaching about the importance of the actual record in the cases that came before him, his near reverence for the record...", 137 F.3d. LXXVI, June 25, 1997, Presentation of Portrait of Judge Leonard I. Garth, by Justice Alito.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

Andrew Policastro
Pro Se
59 Day Avenue
Tenafly, NJ 07670
(201) 568-0387

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 06-1471

[Filed January 24, 2008]

ANDREW POLICASTRO, Appellant	)
v.	)
DR. THEODORA P. KONTOGIANNIS, Principal Tenafly High School; TENAFLY BOARD OF EDUCATION	)

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 04-cv-1219
(Honorable Joel A. Pisano)

Before SCIRICA, *Chief Judge*, FUENTES and CHAGARES, *Circuit Judges*.

OPINION OF THE COURT

SCIRICA, *Chief Judge*.

Appellant Andrew Policastro, a teacher at Tenafly High School, sued the school's principal, Dr. Theodora Kontogiannis, and the Tenafly Board of Education for violation of his First Amendment right to freedom of speech. Following a bench trial, the District Court dismissed Policastro's claims and entered judgment in favor of both Kontogiannis and the school board. We will affirm the judgment in part and dismiss in part.[1]

I.

Policastro is a science teacher at Tenafly High School. On March 13, 2002, at 8:15 a.m., a memorandum was distributed to all Tenafly High School staff members through the teachers' school-provided mailboxes. The memorandum involved a labor dispute between teachers and their union over negotiations of a proposed collective bargaining contract. A ratification vote on the proposal was scheduled that same afternoon. Policastro was one of thirteen teachers who signed the memorandum.

In the words of the District Court, the memorandum was "plain vanilla," containing no vulgarities or obscenities. Yet the memorandum prompted complaints to Dr. Theodora Kontogiannis, principal of Tenafly High School. One complaint reported a "commotion in the library" over the memorandum, and another reported arguments among teachers. Kontogiannis, deciding the memorandum was unacceptably disrupting school activities, removed

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[1] The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343, and we have appellate jurisdiction under 28 U.S.C. § 1291.

all remaining copies from the teachers' mailboxes. Immediately thereafter, a teacher reinserted copies in the mailboxes. Kontogiannis again ordered the memorandum removed and the mailroom door locked for the remainder of the school day.

Based on these events, Policastro filed suit against Kontogiannis and the school board. He alleged that Kontogiannis's removal of the memorandum violated his First Amendment right to free speech, and he challenged as unconstitutional a Tenafly School Board policy restricting the use of teacher mailboxes. Defendants filed a motion to dismiss for failure to state a claim. The District Court granted the motion, and Policastro appealed. We vacated the dismissal and remanded to the District Court for further proceedings. *See Policastro v. Kontogiannis,* No. 04-2883, 2005 WL 1005131 (3d Cir. Jan. 12, 2005).

The District Court conducted a bench trial at which Policastro appeared *pro se.* At the conclusion of both sides' testimony, the District Court adjudicated Policastro's claims and found in favor of both Kontogiannis and the school board and against Policastro.[2] This appeal followed.

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[2] Keen to the need for exigency in this matter, the District Court issued an oral decision from the bench. The judgment employed the term "dismissal," but on review of the transcript it appears plain the court was adjudicating Policastro's claims. Any confusion in wording may have been due to our prior decision vacating the original dismissal for failure to state a claim and remanding for fact finding. But the record reveals Policastro's claims were adjudicated following a bench trial that included testimony from all relevant parties and witnesses.

II.

A.

The Tenafly School Board has a written policy on using teacher mailboxes ("Mailbox Policy"), which provides:

> Mailboxes are the property of the Tenafly Board of Education and should be used for school business. Any staff member wishing to distribute flyers/announcements etc. (via the mailboxes) must have prior approval from the principal or vice-principal.

Policastro claims this policy is unconstitutional on its face. The District Court characterized this claim as an overbreadth challenge, stating it would try the issue of whether the policy "impermissibly extends [to] . . . speech that cannot be constitutionally restricted." (Tr. at 5:20-22). Policastro did not object.[3]

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[3] The *amici curiae* contend the Mailbox Policy is also unconstitutionally vague. But there was no testimony during the bench trial about the risk of discriminatory application of the Mailbox Policy or whether school officials were endowed with undue discretion under the policy. These questions would be central to a vagueness challenge. *See, e.g., Kreimer v. Bureau of Police for Morristown,* 958 F.2d 1242, 1266 (3d Cir. 1992). Accordingly, we will only address overbreadth. *See Gass v. Virgin Islands Tel. Corp.,* 311 F.3d 237, 246 (3d Cir. 2002) ("[I]t is well established that failure to raise an issue in the district court constitutes a waiver of the argument. . . . We only depart from this rule when manifest injustice would result from a failure to

A regulation is unconstitutionally overbroad where there is "'a likelihood that [it]s very existence will inhibit free expression' by 'inhibiting the speech of third parties who are not before the Court.'" *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (quoting *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 799 (1984)). "[A]voidance of this chilling effect is at the heart of the overbreadth doctrine." *Gasparinetti v. Kerr*, 568 F.2d 311, 317 (3d Cir. 1977) (citation omitted). But a regulation's inhibiting nature must be "'not only real but substantial in relation to [it]s plainly legitimate sweep'" to be held unconstitutional. *Saxe*, 240 F.3d at 214 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)). "Because the overbreadth doctrine is 'strong medicine,' it is to be used sparingly, where the demonstrated overbreadth is considerable." *Kreimer*, 958 F.2d at 1265 (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)) (some internal quotation marks omitted).

Here, the District Court held the Mailbox Policy had no actual or potential chilling effect. The court found that Tenafly teachers, including Policastro, had distributed personal documents through the teachers' mailboxes both before and after the subject memorandum was confiscated. The court also found, and all parties agreed, that Tenafly High School administrators had never denied prior approval of a mass distribution, and that–with the exception of the subject memorandum here–nothing had ever been

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consider a novel issue.") (citation and internal quotation marks omitted).

removed from the mailboxes. Furthermore, in terms of the Mailbox Policy's "legitimate sweep," the court credited Kontogiannis's testimony that the purpose of the policy was to ensure that the mailboxes did not become overstuffed to the point where documents involving school business would be missed or lost. Based on these facts, the court concluded that any inhibiting impact of the Mailbox Policy was insubstantial relative to its legitimate scope.

We agree that the record fails to show that the Mailbox Policy has had an actual or potential chilling effect on teacher speech. Policastro admits that "[s]ince the removal of the memo . . . use of the mailboxes by teachers for personal messages (memos, notes, cards, etc.) has continued as usual, without prior approval." Policastro Brief at 5. Accordingly, we will affirm the District Court's denial of Policastro's overbreadth challenge.

B.

Policastro also claims the Mailbox Policy is unconstitutional as it was applied to him. But Kontogiannis testified at trial that she removed the memorandum because of a disruption among the teachers that threatened to disrupt the school's program. There is no evidence in the record demonstrating the Mailbox Policy was the cause of the memorandum's removal. Accordingly, Policastro has not shown he suffered any injury under the policy or that the policy has ever in fact been applied to him. We will affirm the District Court's denial of Policastro's "as applied" challenge to the Mailbox Policy.

III.

Policastro also claims his First Amendment right to free speech was violated whether or not Kontogiannis removed the subject memorandum under the Mailbox Policy.[4] He did not seek damages. He seeks declaratory and injunctive relief only, which, for the reasons set forth below, are forms of relief we have no authority to provide on the facts here. Therefore, we will dismiss this claim as non-justiciable, because even if meritorious, we could not redress it.

To bring and maintain a lawsuit through adjudication, Policastro must have standing. *E.g., Artway v. Attorney Gen. of N.J.*, 81 F.3d 1235, 1246 (3d Cir. 1996). "The three elements necessary to establish the irreducible constitutional minimum of standing are: (1) the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) a causal connection between the injury and the conduct complained of; and (3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Taliaferro v. Darby Twp. Zoning*

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[4] Policastro's *pro se* complaint has been liberally construed to include a claim under 42 U.S.C. § 1983 that the school's actions in removing the memorandum infringed on his First Amendment right to free speech. *See Policastro v. Kontogiannis*, No. 04-2883, 2005 WL 1005131 (3d Cir. 2005). This claim is distinct from his "as applied" challenge to the Mailbox Policy, because he alleges his speech was unconstitutionally silenced by the school's actions even if those actions were motivated by something other than the Mailbox Policy.

Bd., 458 F.3d 181, 188 (3d Cir. 2006) (citing *United States v. Hayes*, 515 U.S. 737, 742-43 (1995)).

In our prior opinion vacating the District Court's dismissal for failure to state a claim, we acted without the benefit of fact-finding. Here, we have discovery and a trial record. On prior review, Policastro's standing was not in question. Policastro's *pro se* complaint, construed liberally, alleged Kontogiannis removed the offending memorandum from teacher mailboxes under the school's Mailbox Policy. Had this been proven, equitable relief might have been proper if the policy were unconstitutional, facially and/or as applied. But the trial testimony unequivocally shows the subject memorandum was removed because of the perceived disturbance it caused, not because of the Mailbox Policy. Because the school's action in removing the memorandum was an isolated occurrence wholly unrelated to the Mailbox Policy, the facts present no ongoing harm or controversy for us to remedy. Accordingly, whether or not Policastro had standing prior to remand, his claims are now moot.

A mootness inquiry asks whether a claimant's standing continues throughout the litigation. "A case is moot when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Donovan ex. rel. Donovan v. Punxsutawney Area School Bd.*, 336 F.3d 211, 216 (3d Cir. 2003) (citation omitted). "The court's ability to grant effective relief lies at the heart of the mootness doctrine." *Id.* "That is, if developments occur during the course of adjudication that eliminate a plaintiff's personal stake in the outcome of a suit or prevent a court from being able to grant the requested relief, the case must be

dismissed as moot." *Id.; see also Green v. Branson,* 108 F.3d 1296, 1299 (10th Cir. 1997) ("The touchstone of the mootness inquiry is whether the controversy continues to touch the legal relations of parties having adverse legal interests in the outcome of the case.") (citation omitted). "The crucial question is whether 'granting a present determination of the issues offered . . . will have some effect in the real world.'" *Utah Animal Rights Coalition v. Salt Lake City Corp.,* 371 F.3d 1248, 1256 (10th Cir. 2004) (alterations in original) (citations omitted).

At this juncture, no available remedy would redress Policastro's suit. He has not sought damages.[5]

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[5] Policastro's suit would likely survive a justiciability challenge if he had sought damages. *See, e.g., Boag v. MacDougall,* 454 U.S. 364 (1982) (holding the transfer to another prison did not moot a prisoner's claim for damages arising from placement in solitary confienement); *Donovan,* 336 F.3d at 218 (holding claims for damages and attorneys fees continued to present a live controversy even though claims for declaratory and injunctive relief were moot); *Jersey Cent. Power & Light Co. v. New Jersey,* 772 F.2d 35, 41 (3d Cir. 1985) ("[T]he availability of damages or other monetary relief almost always avoids mootness. . . ."); *Blau v. Fort Thomas Public School Dist.,* 401 F.3d 381, 387 (6th Cir. 2005) (noting the existence of a damages claim "ensures that [a] dispute is a live one over which Article III gives us continuing authority.") (multiple citations omitted). But Policastro chose not to assert a claim for damages. A request for damages will generally save a case from becoming moot when equitable relief no longer provides an effective remedy, but courts will not read a claim for damages into a complaint that contains no such request. *See Seven Words LLC v. Network Solutions,* 260 F.3d 1089, 1097 (9th Cir. 2001) (holding claims moot where appellant sought only injunctive and declaratory relief but failed to request damages).

Injunctive relief would be unavailable for Policastro at this time, and declaratory relief would amount to no more than an advisory opinion regarding the "wrongfulness" of past conduct. *See, e.g., Green v. Branson,* 108 F.3d at 1299-1300 (10th Cir. 1997) ("[A party's] 'legal interest' must be more than simply the satisfaction of a declaration that a person was wronged.") (citing *Ashcroft v. Mattis,* 431 U.S. 755, 761 (1987)). The Supreme Court has consistently held "a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Preiser v. Newkirk,* 422 U.S. 395, 401 (1975) (quotation omitted). The Court has provided further guidance on this point:

> "In all civil litigation, the judicial decree is not the end but the means. At the end of the rainbow lies not a judgment, but some action (or cessation of action) by the defendant that the judgment produces–the payment of damages, or some specific performance, or the termination of some conduct. Redress is sought *through* the court, but *from* the defendant. This is no less true of a declaratory judgment suit than of any action. The real value of the judicial pronouncement–what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion–is in the settling of some dispute *which affects the behavior of the defendant towards the plaintiff.*"

Rhodes v. Stewart, 488 U.S. 1, 3-4 (1988) (quoting *Hewitt v. Helms,* 482 U.S. 755, 761 (1987)) (emphases in original).

Accordingly, where Policastro has not sought damages, and we are unable to afford him meaningful alternative relief, his claim that Kontogiannis's removal of the subject memorandum from teacher mailboxes violated his First Amendment right to free speech is moot.[6]

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[6] We note that the "capable of repetition yet evading review" exception to mootness, *e.g.*, *Brody ex. rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1113-15 (3d Cir. 1992), does not apply here. "This extremely narrow exception to the mootness doctrine is applicable only where: 1) the challenged action is too short in duration to be fully litigated before the case will become moot; and 2) there is a reasonable expectation that the complaining party will be subjected to the same action again." *Donovan*, 336 F.3d at 217 (citing *Weinstein v. Bradford*, 423 U.S. 147 (1975) (per curiam)). The prospect of a similar memorandum being removed from teacher mailboxes under the facts here is too speculative to warrant invocation of this narrow exception. *See, e.g., Preiser v. Newkirk*, 422 U.S. 395, 403 (1975) ("Any subjective fear [Plaintiff] might entertain of being again [subjected to] circumstances similar to those alleged in the complaint . . . is indeed remote and speculative and hardly casts [a] 'continuing and brooding presence' over him . . . .") (citation omitted). Even looking beyond the unique circumstances of the union negotiations at the heart this case, the record demonstrates, and Policastro himself asserts, that no other item–among the many hundreds of items inserted in teacher mailboxes–has been removed from teacher mailboxes, either prior to or subsequent to the removal of his memorandum. Moreover, because of email and other technologies, the teacher mailboxes no longer serve as the primary means of communication between the school and its teachers.

IV.

For the foregoing reasons, we will affirm the District Court's denial of Policastro's facial and as applied challenges to the school's Mailbox Policy. We will also dismiss as non-justiciable Policastro's claim that his First Amendment right to free speech was violated.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 06-1471

[Filed January 24, 2008]

ANDREW POLICASTRO,	)
Appellant	)
	)
v.	)
	)
DR. THEODORA P. KONTOGIANNIS,	)
Principal Tenafly High School;	)
TENAFLY BOARD OF EDUCATION.	)
	)

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 04-cv-1219
(Honorable Joel A. Pisano)

Argued January 23, 2007

Before: SCIRICA, *Chief Judge*, FUENTES and CHAGARES, *Circuit Judges*

JUDGMENT

This cause came to be heard on the recrod from the United States District Court for the District of New Jersey and was argued by counsel on January 23, 2007. On consideration whereof, it is now hereby

ORDERED and ADJUDGED by this Court that the judgment of the District Court entered January 11, 2006, be, and the same is hereby affirmed in part and appellant's claim that his First Amendment right to free speech was violated is dismissed as non-justiciable. Costs taxed against appellant. All of the above in accordance with the opnion of this Court.

ATTEST:

/s/ Marcia M. Waldron, Clerk

DATED: January 24, 2008

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

CIVIL NO. 04-1219

[Dated January 11, 2006]

ANDREW POLICASTRO,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
DR. THEODORA KONTOGIANNIS, TENAFLY BOARD OF EDUCATION,	)
	)
Defendants.	)
	)

Newark, New Jersey
January 11, 2006

BEFORE:
THE HONORABLE JOEL A. PISANO
UNITED STATES DISTRICT COURT JUDGE

THE COURT: Back on Policastro. I have, since the recess yesterday, considered all of the issues at some length. I've also had the benefit of reading the

transcript of the entire proceedings so I'm prepared to rule on this.

Is there anything else anybody would like to argue, Mr. Policastro, Mr. Thibault, anything you would like to argue?

MR. THIBAULT: No, I think we argued everything on the motion and partial summary judgment.

THE COURT: Mr. Policastro, do you have anything else you would like to say about this?

MR. POLICASTRO: No, your Honor.

THE COURT: All right.

I'm going to do this from the bench without writing a formal opinion for a couple of reasons. The first being that this case has been pending for long enough, I think for everybody's purposes, having now occupied the resources of five federal judges and their staff.

Based upon the experience in trying the case yesterday, we had the participation of a significant number of faculty of Tenafly High School, which has been, from what I gather, not only explicitly from the record but reading between the lines, been embroiled in whatever this dispute came from since 2002.

I think the parties are interested in a speedy resolution and so is the Court.

The second reason I'm not going to submit this to formal writing is that, as I indicated yesterday, there

doesn't seem to be much of a dispute either as to the law or the facts of this case. I don't think it would serve anybody's purpose to add to the literature by publishing or filing yet another opinion discussing the legal landscape pertaining to the type of expression which is in this case.

We've got a number of cases speaking about the subject matter and we'll be citing to some of them. They're already in the briefs and they're already in the opinions, but taking as the law of the case the opinion from the Third Circuit in this matter, there is a recital of the legal landscape which is entirely consistent with this Court's legal discussion on the -- in the opinion in which the Court dismissed the complaint originally.

The Third Circuit did not in any way change this Court's view of the law, but rather concluded that the Court was improvident in dismissing this case without making some findings of fact. That is to say, the Third Circuit found that this was not an appropriate dismissal based upon the allegations in the complaint, but rather needed to develop a record as stated in the slip opinion at page six; in order to require Tenafly to put forth facts which might reasonably have led school authorities to forecast a specific and significant fear of disruption, not just some remote apprehension of disturbance.

That, of course, is language that comes directly from the *Tinker* case, which has been cited here more times than we need to mention, and is also entirely consistent with other case law which has been published on the subject, particularly including the

opinion in *Saxe v. State College Area School District*, Third Circuit opinion, 240 F.3d at page 200.

The *Saxe* case is pretty interesting because it does contain a very clear review of the *Tinker* standards and then goes further into some discussion of some other cases involving school law, retaliation, employment decisions, of course which are not implicated here, for example, from *Hazelwood* and some other cases that we're familiar with.

The other thing that's interesting about the *Saxe* opinion is that it also included a discussion of a challenge, a facial challenge to a regulation which was designed to restrict and control expression within the school.

So all of that being said, it appears to me that there, as I indicate, is not much of a dispute as to what the law in this case is. Generally speaking, quoting from *Saxe*, referring to *Tinker*, page 211, "regulations of student speech is generally permissible only when the speech would substantially disrupt or interfere with the work of the school or the rights of other students." Again, *Saxe* is talking about student speech, not factually pertinent here, but the speech, the regulation of the speech is subject to the same legal standards.

And as oddly enough Judge Alito goes on, on page 211, "As subsequent cases have made clear, *Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of the disturbance."

That's an interesting quote because I believe it serves as a basis to analyze both types of claims in this case. We have in this case a challenge to the act of Dr. Kontogiannis in removing from the teachers' mailboxes the exhibit P-1 that we have in evidence and closing the teacher mailboxes thereafter; and, secondly, we have a challenge to the regulations maintained by the Tenafly High School and Board of Ed, which would require prior approval if a teacher or staff member wanted to make a mass distribution, either of written materials in the teachers' mailboxes or in the electronic form in the e-mails.

I say that this quote which I'll read again, "*Tinker* requires a specific and significant fear of disruption, not just some remote apprehension of disturbance," that statement can be applied and can be analyzed in the face of both types of claims in this case.

Now, the facts of the case again are really not much in dispute. They were pretty much fleshed out in the briefs before this Court on the motion to dismiss, except for the fact that we didn't have the benefit of the testimony of some of the individuals who shed some light on the ultimate question as framed by the Third Circuit, which is whether Tenafly can come forward with facts to demonstrate that there was a substantial -- that there was a fear of significant disruption or disturbance in school affairs.

The case appears to arise out of some sort of internal Tenafly teacher union controversy. There hasn't been any direct testimony on the subject, but we had the benefit of the testimony of a number of teachers, including Mr. Policastro, who was a teacher,

and still is from what I gather, a teacher at Tenafly High School. We had the testimony of James Vere, Douglas Golde, Anne Lander, Felice Loffredo, James Sutera, Diane Kratz, Adam Rendell, April Celli, Kenneth Berman and the secretary to the director of athletics, Chloie Biscaldi. We also have had the testimony from Dr. Kontogiannis, who was and is the principal and who took the action here both to remove the memorandum, exhibit P-1, and also shed light on the purpose and theory of the regulation for prior approval.

We also had the testimony of Howard Glaser who was not a teacher at Tenafly High School, but rather was in a position of leadership in the teachers' union and became aware of the facts that were ongoing on the date in question of March 13, 2002.

In any event, the facts are, and I find as facts that there was some sort of an internal, internecine squabble among the rank and file of the Tenafly Teachers' Union; that on the day in question there was to be a ratification vote as to a proposed contract which had been negotiated by the teachers' union on behalf of its members; that on March 13, 2002, someone created the document, P-1, which was ultimately signed by 13 individuals, including Mr. Policastro, the plaintiff here; Mr. Policastro did not author the document nor did he distribute the document which I also find to be an interesting ironic addition to this factual scenario.

We have a plaintiff who neither authored nor distributed the document that is in question, yet he is

the one who is asserting some afront to his First Amendment freedom of expression.

Be that as it may, he adopts the content of the memo and we will assume, and there is no issue, that his expression and rights to expression are in issue in the case as a result, at least it hasn't been challenged on that basis.

Now, the language in the memorandum consists of five questions as they are stated which were at least hypothetically being directed to the negotiating team who had arrived at whatever the deal was ultimately going to be presented to the rank and file of the teachers' union. There is nothing in the record to indicate whether or not these five questions or issues had been raised previously in the negotiating process or whether anybody who signed P-1 was even on the negotiating team, but be that as it may, the document appears to contain five questions directed toward the negotiating team.

There is testimony that Douglas Golde, on the day in question, is the individual who placed P-1 in each of the teachers' mailboxes in Tenafly High School and he said that he remembered doing it somewhere about 8:30 in the morning. The facts are that he was told sometime later that morning that they were gone, so he went back into the mail room and replaced in every teacher's mailbox another copy of P-1.

There is no testimony as to how the document was created, whether it was copied on school copy machine utilizing public supplies, we don't know where he got it from, it doesn't really matter. In any event, at

sometime following Mr. Golde's placement and distribution of these two copies of the memo, P-1, it is a fact that has been adduced not only through the testimony of Dr. Kontogiannis but through the testimony of some of the individuals who testified, including Mr. DiGregorio, by the way, whom I left out I believe of the statement of witnesses that I set forth.

It is clear from the testimony of the witnesses and it is in the record that the memorandum, P-1, did result in controversy within the Tenafly High School building. That is testimony that came from Mrs. Kratz, it is testimony that came from Miss Biscaldi, it is testimony that came from Miss Loffredo and it is testimony that came from Mr. DiGregorio and from Dr. Kontogiannis herself. It was characterized somewhat differently depending upon the frame of reference of each individual who knew about it, but suffice it to say, Dr. Kontogiannis summarized the scenario as being one of disruption, confusion, there was controversy, teachers were out of their classrooms discussing the contents of the memo in the hallways, in the library and she concluded that there was a significant disruption in the operation of the school such that she took it upon herself, first of all, to remove P-1 from the mailboxes in the first instance and then when she learned that they had been replaced, to physically close the mail room in order to restore order to the school community.

That testimony is corroborated, at least in substance, by the testimony of the other individuals who were aware of the controversy. Most significantly her testimony, that is the testimony of the principal, was corroborated significantly by Mr. DiGregorio, who

was the library monitor, who testified that there was, in fact, a significant disruption involving teachers who were present in the library and who were not acting in a way, to use the pedagogical term, on task. It is also corroborated by the testimony of Miss Biscaldi, it is corroborated by the testimony of Mrs. Kratz and it is corroborated by the testimony of Mr. Glaser, who was at the time, I believe he still is, a special education teacher at the middle school in a different building, but in his capacity as a member of the personal rights committee of the Tenafly Teachers' Union, he received notice of the problem and was asked to come over and he did come over and speak to Dr. Kontogiannis about the incident.

I find the foregoing to be facts that are supported in this record.

Now, Mr. Policastro, as plaintiff, makes a claim that his freedom of expression was violated and restricted unconstitutionally, first of all, by the conduct of Dr. Kontogiannis in removing the memo, P-1, from the teacher mailboxes and subsequently closing the mail room and secondly, that their exists in the Tenafly High School a regulation promulgated by the Board of Education which requires prior approval in the event of a distribution on a wholesale basis of any memos through the mailboxes or electronic communications over the e-mail system.

Now, putting aside for the moment as we get to that second claim, putting aside for the moment that it appears to the Court that at least with respect to the e-mail regulation, that it is utterly unenforceable. Putting that aside for the moment, nevertheless, we

need to determine whether, and this is interestingly, as I say, discussed in the Saxe opinion, it is necessary to determine whether there can be a facial challenge that would succeed on a constitutional basis to that regulation.

Mr. Policastro has testified, and the Court accepts as facts, with respect to the second claim, that is the challenge to the prior approval regulation, that as a result of its very existence, Mr. Policastro has refrained from making any attempt to distribute wholesale any written communications in the mailboxes at Tenafly High School.

Of course we cannot lose sight, and I find as a fact, that James Sutera did make a wholesale distribution of written material in the mailboxes without receiving prior approval and he did so in November of 2003, and I find as a fact that Mr. Policastro himself chose to make a wholesale distribution of written material without prior approval in placing the exhibit P-18 in the mailboxes on a date subsequent to March 13, 2002.

This, that is to say the distributions made by Sutera and Policastro, in my view, undercut the plaintiff's claim because there is further testimony in the record, and I find as a fact, corroborated by Dr. Kontogiannis, that approval, prior approval to make a wholesale distribution had never been refused prior to March 13, 2002, nor has it ever been refused subsequent to March 13, 2002.

As a matter of fact, Mr. Policastro, in my view, cannot be heard to complain that this regulation has chilled his rights to expression simply because he has

chosen not to pursue whatever it is he wanted to communicate and his testimony was something about running for president of the state NJEA, the education association and that he made wholesale distributions of materials to teachers in other buildings, but chose to eliminate his own out of fear of enforcement, selective enforcement of this regulation, which I find as a fact was not going to happen.

So the question becomes, with respect to the second type of claim, that directed toward the prior approval regulation, whether that prior approval regulation itself recognized a legitimate pedagogical concern of the administration that there could be a substantial disruption generated.

Now, what is the testimony on that? The testimony as to the meaning and purpose of this prior approval regulation comes from Dr. Kontogiannis and she testified very forthrightly that the purpose for the regulation was to make sure that if there was going to be some wholesale distribution of non-school related communication or material, that is to say something less than a particular communication to some teachers and not others, that she would have a legitimate concern that other communications that are necessary during the school day might be lost in the shuffle. This isn't, in my view, in any way unreasonable. It isn't in any way unreasonable and I must say, Mr. Policastro, this complaint of yours with respect to that regulation is a mystery to me.

So the Third Circuit's opinion in this case raised the question for its ultimate determination whether Tenafly could put forth facts which might reasonably

have led Dr. Kontogiannis to forecast a specific and significant fear of disruption. Well, I have found and I do conclude that Dr. Kontogiannis' testimony is entirely credible, it is corroborated by other witnesses that I have just recounted, but her testimony is entirely credible and believable; that there was following the distribution of the memo, P-1, a substantial disruption in the school.

It is beside the point, in my view, that the language in the memorandum, P-1, was not lude, vulgar, obscene or inflammatory, but it is only relevant to the Court that the distribution of that memo resulted in her mind a conclusion that there was a substantial disruption, and she then set about to exercise her discretion as principal in order to restore order to the Tenafly High School.

I find her testimony to be credible, I find her conduct to have been reasonable under all of the circumstances and, indeed, as an aside, had she not acted in the way she did, I think she could significantly be criticized for permitting a situation of chaos to continue where it certainly didn't belong.

As a result, I conclude as a matter of law that there has been demonstrated by Tenafly a specific -- there has been demonstrated by Tenafly that a significant disruption did occur and consequently as we move to the second claim, that subsequent to March 13, 2002, Mr. Policastro's First Amendment rights had been unconstitutionally chilled, it would seem to me that the events of March 13, 2002, entirely justify the existence of the prior approval regulation because in the mind of Dr. Kontogiannis, if a memorandum,

however plain vanilla, could cause a disruptive situation on March 13, 2002, then why not some other communication subsequently? This, of course, is again in the context of there never having been the refusal to make a wholesale distribution, nor did it prevent both Mr. Policastro and Mr. Sutera and people that we might not even know about because they didn't testify, who may have made wholesale distributions of written materials themselves.

So whether you look at it from the point of view that the regulation is reasonable, that it has a demonstrable reasonable basis from an educational standpoint or whether you look at in connection with and in addition to the events of March 13, it is entirely reasonable for the principal to conclude that there might be an occasion when she should exercise her discretion and refuse to permit a wholesale mass distribution of material.

While we're on the subject, having read the language of this prior approval regulation, it is clear to me from the first paragraph of it that there is absolutely no preclusion from teachers making communications through the use of mailboxes and, in fact, the first paragraph of this regulation, in my view, should be read to be encouraging communication among teachers through the use of mailboxes.

The sentence in dispute, as testified to by Mr. Policastro, relates only to the one part of the last sentence in the second paragraph which requires prior approval in the event of what I conclude is only a wholesale mass distribution of materials and I think the regulation is self-evident to make that distinction.

Having said that and made those conclusions, the same conclusions in my view apply to the e-mail communications, although we know in the modern world, we know as a practical matter that that regulation is probably beyond enforcement and, frankly, I don't know what the Tenafly High School is going to do about that. We have the exhibits which are numerous of jokes, personal communications, frivolous material back and forth, all to the utter waste of time, effort and resources of the public entity.

On that subject, a little bit more. I would be remiss, I think, if I did not recognize what I consider to be an utterly inordinate expense of public resources, Mr. Policastro, represented by this case. This case has been pending in this court, in the Court of Appeals for going on two years. You have a right of access to the courts. Your right of access to the courts has been honored.

I do not have a complaint personally or officially with the fact that you filed this complaint, I do not have any argument with you. You're entitled to do it, you're entitled to be heard fully and I believe you have been fully heard, but taking into account the factual scenario of this case, it is beyond my personal comprehension, Mr. Policastro, first of all, why this was so upsetting to you, but what is upsetting to me and what I do take issue with is the fact that you subpoenaed, while you didn't subpoena them, the Board of Education accommodated you, they indulged your request, to require to be present in this courthouse a large number of staff members of the Tenafly Board of Education.

You have a right to file this lawsuit, you have a right to pursue your rights, I have no quarrel with it, but this represents to me, for whatever your personal motive may have been in pursuing this crusade, this represents to me a tragic waste of public resources.

So for the reasons that I have expressed, notwithstanding my most recent criticism, but for the reasons that I have expressed based upon my fact findings and conclusions of law, I am satisfied that this complaint must be and is hereby dismissed in its entirety and a judgment will be entered in favor of the defendants and against the plaintiff.

Thank you for coming.

Mr. Policastro, I suggest you go back to work.

MR. POLICASTRO: Thank you, your Honor.

THE COURT: Is there any application for costs?

MR. THIBAULT: Your Honor, I think the Tenafly Board of Education at this point will be happy that the complaint is just dismissed.

THE COURT: All right.

The case is dismissed without costs.
(Trial concluded.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civil 04-1219 (JAP)

[Filed January 11, 2006]

Andrew Policastro,	)
	)
Plaintiff,	)
	)
-vs-	)
	)
DR.Kontogiannis, et al.,	)
	)
Defendant.	)
	)

JUDGMENT IN A CIVIL CASE

This action came before the Court for a NON JURY TRIAL. The issues were tried and the Court rendered its decision:

By its decision, the Court established that a judgment of NO CAUSE FOR ACTION be entered in favor of all the defendants, and against the plaintiff, with prejudice and without costs. Ordered case dismissed.

DATE January 11, 2006

S/ JOEL A. PISANO, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

No. 04-2883

[Filed January 12, 2005]

Andrew POLICASTRO,	)
Appellant	)
	)
v.	)
	)
Theodora P. KONTOGIANNIS,	)
Principal Tenafly High School;	)
Tenafly Board of Education	)
	)

Submitted Under Third Circuit LAR 34.1(a)
Jan. 5, 2005
Decided Jan. 12, 2005
Order Denying Rehearing April 12, 2005

On Appeal from the United States District Court
for the District of New Jersey
(D.C. Civil No. 04-CV-01219)
District Judge: Honorable Joel A. Pisano

Andrew Policastro, Tenafly, NJ, pro se.
Arthur R. Thibault, Jr., Apruzzese, McDermott, Mastro & Murphy, Liberty Corner, NJ, for Appellees.

Before: NYGAARD, VAN ANTWERPEN AND ALDISERT, Circuit Judges.

BEFORE: SCIRICA, Chief Judge, SLOVITER, NYGAARD, ALITO, ROTH, MCKEE, RENDELL, BARRY, AMBRO, SMITH, FUENTES, FISHER, VAN ANTWERPEN, and ALDISERT, Circuit Judges.[1]

OPINION

PER CURIAM.

Andrew Policastro, a teacher at Tenafly High School in New Jersey, filed a *pro se* civil rights suit in the District Court for the District of New Jersey, alleging violation of his First Amendment right of freedom of speech by the principal of Tenafly High School, Theodora Kontogiannis, and the Tenafly Board of Education, collectively "Tenafly." Tenafly filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss for failure to state a claim. The District Court granted the motion, and Policastro appeals. We will vacate and remand.

I.

The District Court had jurisdiction pursuant to 28 U.S.C. § 1331 and we have appellate jurisdiction under 28 U.S.C. § 1291.

Our review of the District Court's grant of a motion to dismiss is plenary. *Green v. America Online,* 318

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[1] Judge Aldisert's vote is limited to panel rehearing only.

F.3d 465, 470 (3d Cir.), *cert. denied* 540 U.S. 877, 124 S.Ct. 200, 157 L.Ed.2d 140 (2003). We accept as true the factual allegations in the complaint and all reasonable inferences that can be drawn therefrom. *Id.* We will affirm only if no relief can be granted under any set of facts the plaintiff could prove. *Id.*

II.

Policastro's complaint alleges that on the morning of March 13, 2002, a memo entitled "Questions for the Tenafly Negotiation Team" (hereinafter the "Memo") and signed by 13 teachers including himself was placed in the internal mail boxes of the Tenafly High School teachers. A35. The Memo was subsequently removed by or at the authority of Principal Kontogiannis. *Id.* The Memo was again placed in the mail boxes, and again removed by or at the authority of Principal Kontogiannis. *Id.* The mail room was then locked for the remainder of the day. *Id.* The ratification vote for the teacher's contract was held later that day after school. *Id.* Policastro also claims that the internal mail boxes are used for "personal messages, holiday cards, birthday cards, gifts, fliers from local merchants, memos from teachers, notes from teachers, notes from parents, notes from students, U.S. mail, union information and administrative concerns." *Id.* Policastro sought as relief (1) a declaration that the administrative policy requiring prior approval of items placed in the mail boxes is unconstitutional; (2) the removal of any reference to the prior approval policy from the administrative manual, teacher contracts, etc.; (3) a declaration that the removal from the mail boxes of any communication between Tenafly public school

teachers is unconstitutional; (4) permission for Tenafly public school teachers to use the school email system for internal and external email between Tenafly teachers; and (5) permission for Tenafly public school teachers to use the school media facilities. *Id.*

Construing this *pro se* complaint liberally, *see Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972), Policastro essentially claims that his First Amendment rights are being violated by: (1) the removal of the Memo from the teachers' mail boxes; (2) the policies and/or directives requiring the teachers to obtain prior approval before placing material in the mail boxes; and (3) the prohibition on using the school's email and other media facilities for communications between Tenafly teachers. The prior approval policy, documented in the Administrative Manual for Teachers, states:

> Mailboxes are the property of the Tenafly Board of Education and should be used for school business. Any staff member wishing to distribute flyers/announcements, etc. (via the mailboxes) must have prior approval from the principal or vice-principal.

A36-37.[1]

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[1] Although a court considering a motion to dismiss generally may not consider matters extraneous to the pleadings, a court may consider a "document integral to or explicitly relied upon in the complaint." *In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997).

III.

A.

It is well established that teachers do not "shed their constitutional rights to freedom of speech . . . at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). However, school officials may still, "consistent with fundamental constitutional safeguards, . . . prescribe and control conduct in the schools." *Id.* Thus, a school may categorically prohibit lewd, vulgar or profane language. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986)). A school may also regulate school-sponsored speech on the basis of any legitimate pedagogical concern. *Id.* (citing *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988)). School-sponsored speech occurs when the school "aims 'to convey its own message'"; whereas private speech occurs when the school "facilitates the expression of 'a diversity of views from private speakers'." *Child Evangelism Fellowship v. Stafford Township Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004) (quoting *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833-34, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995)). Any speech falling outside of these two categories is subject to the general rule of *Tinker* that the speech may be regulated "only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214; *see also Tinker*, 393 U.S. at 509; *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 254 (3d Cir. 2002) (applying *Tinker* to school policy that

prohibited students from wearing an expressive t-shirt).

When, as in this case, the forum for the speech is a school internal mail box, the forum is considered non-public. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). Accordingly, any regulation of the forum must be "reasonable in light of the purpose served by the forum" and must be "viewpoint neutral." *Child Evangelism*, 386 F.3d at 526 (quoting *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 392-93, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993)); *see also Perry*, 460 U.S. at 46.[2]

B.

The Memo contained five questions regarding the negotiation of the Tenafly teachers' contract. *See* A10. The Memo does not contain lewd or vulgar statements. Tenafly appears to argue that any speech conducted through the mailboxes is school-sponsored because the mailboxes are the property of Tenafly. Brief on Behalf of Appellees at 13-14 (arguing that Tenafly is not required to promote speech through use of the mailboxes, as opposed to tolerating speech as in

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[2] Policastro argues that the internal mail boxes are a limited public forum as to the teachers, and that *Perry* is distinguishable because it involved non-school employee use of the mail boxes. Informal Brief at 15-18. We need not reach this issue because, as recognized by the District Court, a limited public forum is governed by the same reasonableness and viewpoint neutral standard as a non-public forum.*Child Evangelism*, 386 F.3d at 526.

Tinker). However, in light of Policastro's allegations that other personal materials are distributed in the mailboxes, a reasonable inference can be made that he is alleging that the Memo can not be viewed as school-sponsored. Thus, the speech would fall under the *Tinker* rule, whereby Tenafly can only regulate the speech if it would "substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214.

The *Tinker* rule requires Tenafly to put forth facts which might reasonably have led school authorities to forecast "a specific and significant fear of disruption, not just some remote apprehension of disturbance." *Id.* at 211; *see also Tinker*, 393 U.S. at 514. Whether or not Tenafly can satisfy this burden involves factual issues that are not appropriate for resolution at this stage of the proceedings.[3] *See Asociacion de Educacion Privada de Puerto Rico, Inc. v. Echevarría-Vargas*, 385 F.3d 81, 86 (1st Cir. 2004) (finding 12(b)(6) dismissal erroneous where facts needed to be developed to determine strength of state's justification for regulation that allegedly restricted First Amendment rights). Accordingly, making all reasonable inferences in Policastro's favor, we find that the complaint adequately states a claim that the Memo was not within the scope of speech that could be

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[3] Tenafly asserts in its motion to dismiss that the prior approval policy is necessary because otherwise the mailboxes would "become inundated with . . . non-school business related documents," and that "[w]ithout some control over what is placed in the teacher mailboxes, important announcements from administration officials could go unnoticed or be discarded by teachers as simply junk mail." Motion Dismiss Brief at 16.

constitutionally restricted. For the same reasons, we find that the complaint states a claim that the prior approval policy also impermissibly extends to speech that can not be constitutionally restricted.

The complaint also alleges that the mailboxes were being used for other personal communications. Thus, even if the Memo, specifically, and the mailboxes, in general, could be constitutionally prescribed, we find that the complaint also states a claim that the removal of the Memo and/or the implementation of the prior approval policy was not reasonable and not viewpoint neutral. *Child Evangelism, supra.*

C.

As to the internal email system and other media facilities,[4] it may be reasonably inferred that Policastro is alleging that there are certain unspecified restrictions on the use of these facilities, despite the facilities being otherwise available for personal communications. Policastro's failure to identify any specific restrictions and/or prohibited communications makes this claim a much closer call. Nonetheless, consistent with the notice pleading requirements of Federal Rule of Civil Procedure 8(a), we find Policastro's allegations sufficient to state a claim that Tenafly's policy regarding email and media facility use

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[4] Policastro's use of the term 'media facilities' apparently encompasses the teachers mailboxes as well as teacher billboards. Informal Reply Brief at 1-2. Because we have previously addressed the mailboxes, this discussion is limited to the teachers' billboards.

is unconstitutionally restrained. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (plaintiff's complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it is based").

D.

Lastly, on appeal Policastro argues that the removal of the Memo violated the letters of the carrier exception to the Postal Service's restrictions on the carrying of letters. *See* 39 C.F.R. § 310.3(b); Informal Brief at 32-34. This claim was not presented in Policastro's complaint or otherwise raised in the District Court. Accordingly, we decline to consider it on appeal. *Lloyd v. Hovensa, LLC.*, 369 F.3d 263, 272-73 (3d Cir. 2004).

IV.

In conclusion, Policastro's complaint adequately states claims for violation of his First Amendment right to free speech. Accordingly, we will vacate the dismissal of the complaint, and remand for further proceedings.

SUR PETITION FOR REHEARING

NYGAARD, J.

The Petition for rehearing filed by the Appellees in the above-entitled matter having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in

the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

No. 04-1219 (JAP)

[Filed June 8, 2004]

ANDREW POLICASTRO	)
	)
v.	)
	)
DR. THEODORA P. KONTOGIANNIS	)
and TENAFLY BOARD OF EDUCATION	)
	)

PISANO, District Judge:

Defendants Dr. Theodora P. Kontogiannis ("Kontogiannis") and Tenafly Board of Education (the "Board") (collectively "Defendants") move to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Plaintiff Andrew Policastro ("Policastro") opposes this motion. The Court has jurisdiction under 28 U.S.C. §1331, and resolves this motion without oral argument, as permitted under Rule 78 of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court grants Defendants' motion and dismisses the complaint with prejudice.

In this matter, Policastro appears pro se and, as such, this Court must construe his pleadings liberally. See *Estelle v. Gamble*, 429 U.S. 97, 106 (1976). Mindful of this obligation, the Court reviews this motion by taking as true all factual allegations in the complaint and any reasonable inferences that can be drawn from them to determine whether Policastro may have a viable cause of action. *Higgens v. Beyer*, 293 F.3d 683, 688 (3d Cir. 2002) (citing *Nami v. Fauver*, 82 F.3d 63, 65 (3d Cir. 1996)). Accordingly, the facts recited below are taken from Plaintiff's Complaint, and do not represent this Court's factual findings.

Policastro is a teacher at Tenafly High School. Defendant Kontogiannis is the principal of Tenafly High School. Plaintiff alleges that during the morning of March 13, 2002, a memo, signed by thirteen teachers, was placed in the teachers' mailboxes and was subsequently removed by or under the authority of Kontogiannis. (Compl. ¶ 6). The memo was again placed back in the mailboxes and was again removed by or under the authority of Kontogiannis. (Id. ¶ 7). March 13, 2002 was ratification day for the teachers' contract, and the memo posed questions about the proposed contract. (Id. ¶ 8; Affidavit of Arthur R. Thibault, Jr. (hereinafter "Thibault Aff."), Ex. B). Plaintiff alleges that his First Amendment rights were violated by Kontogiannis' actions, and further alleges that the teacher mailboxes are used for personal messages, holiday cards, birthday cards, gifts, fliers from local merchants, memos from teachers, notes from teachers, notes from parents, notes from students, U.S. mail, union information and administrative concerns. (Compl. ¶ 10).

In Plaintiff's demand for relief, he requests that this Court deem unconstitutional and remove any language in any administrative manual for teachers, teacher manual, teacher contract, school policy, board policy, or administrative directive that requires administrative permission or prior approval of items placed in the teachers' mailboxes. (Id. ¶ 11). Plaintiff also requests that this Court deem unconstitutional the removal of memos or other communications between teachers from teachers' mailboxes. (Id. ¶ 13). Finally, Plaintiff requests that the teachers be allowed use of the school email system as well as other media facilities for personal messages. (Id. ¶¶ 14, 15).

The Administrative Manual (the "Manual") for teachers at Tenafly High School explains that the teachers' mailboxes in the high school "are the property of the Tenafly Board of Education and should be used for school business." The Manual further states that "any staff member wishing to distribute flyers/announcements, etc. (via the mailboxes) must have prior approval from the principal or vice-principal." (Thibault Aff., Ex. C).

The use of the teachers' mailboxes is also addressed in the Collective Bargaining Agreement ("CBA") between the Tenafly Board of Education and the Tenafly Education Association. The CBA provides that "the Association shall have the right to make reasonable use of the inter-school mail system for distribution of Association materials provided this does not interfere with school operations. The building Principal shall be made aware of such use." (Id., Ex. D).

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a complaint "for failure to state a claim upon which relief can be granted." In considering a Rule 12(b)(6) motion, a court accepts as true all of the factual allegations within the complaint and any reasonable inferences that may be drawn from them. *Hayes v. Gross*, 982 F.2d 104, 106 (3d Cir. 1992). Claims will be dismissed under Rule 12(b)(6) only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 4546 (1957).

Accordingly, a district court reviewing the sufficiency of a complaint has a limited role. In performing that role, the court determines not "whether the plaintiffs will ultimately prevail," but "whether they are entitled to offer evidence to support their claims." *Langford v. Atlantic City*, 235 F.3d 845, 847 (3d Cir. 2000); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1420 (3d Cir. 1997); *Syncsort Inc. v. Sequential Software, Inc.*, 50 F. Supp. 2d 318, 325 (D.N.J. 1999); *In re Mobile Media Sec. Litig.*, 28 F. Supp. 2d 901, 922 (D.N.J. 1998). Generally, the court's task requires it to disregard any material beyond the pleadings. *Burlington Coat*, 114 F.3d at 1426; *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993). A district court may, however, consider the factual allegations within other documents, including those described or identified in the complaint and matters of public record, if the plaintiff's claims are based upon those documents. *Burlington Coat*, 114 F.3d at 1426; *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 707 (3d Cir. 1996); *In re Donald J. Trump Sec. Litig.*, 7 F.3d

357, 368 n.9 (3d Cir. 1993); *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. References to documents attached to the complaint do not convert a motion to dismiss into a summary judgment motion. *Burlington Coat*, 114 F.3d at 1426.

Plaintiff's Complaint challenges the policy of the Board that requires teachers who wish to utilize the teacher mailboxes to obtain permission from the school principal. Plaintiff alleges that the policy violates his rights under the First Amendment.

The United States Supreme Court has recognized that "teachers [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969). First Amendment protection extends to many places, including a teacher's mailbox. *Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 44 (1983). However the Supreme Court has never suggested "'that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs. . . for unlimited expressive purposes.'" Id. (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 11718 (1972)). Instead, the right to freedom of speech depends upon the character of the property or forum at issue. *Perry*, 460 U.S. at 44.

In *Perry*, the Supreme Court distinguished between three types of government property and the government's ability to limit speech on each type of property. First, the Court discussed the traditional public forum. Id. at 45. The traditional public forum is comprised of streets and parks which "'have

immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" Id. (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)). For the government to enforce a content-based exclusion in the traditional public forum, the regulation must serve a compelling state interest and must be narrowly drawn to achieve that interest. Id. at 45.

The second type of public property "consists of public property which the state has opened for use by the public as a place for expressive activity." Id. Examples of this type of forum include university meeting facilities, school board meetings, and municipal theaters. Id. Although reasonable time, place, and manner restrictions are permitted, any content-based prohibition can only be effectuated when there is a compelling state interest. Id. at 46.

The third type of government property is the non-public forum. Id.[1] In addition to time, place, and manner regulations, the state may place a content-based prohibition "as long as the regulation on speech is reasonable and not an effort to suppress expression

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[1] The courts have recently defined a fourth category of government property called the limited public forum. A limited public forum "is one that the government opens to particular type of communicative activity, on the basis of subject matter and speaker identity." *Child Evangelism of N.J., Inc. v. Stafford Township Sch.* Dist., 233 F.Supp. 2d. 647, 657 (D.N.J. 2002) (citing *Milford*, 533 U.S. at 107). The government's right to restrict access to a limited public forum is subject to the same level of scrutiny as the non-public forum.

merely because public officials oppose the speaker's view." Id.

The Supreme Court held that the school mail facility in *Perry* fell under the third category. Id. The Court noted that the mailboxes are not open to the general public, and instead, permission to use the system must be given by the building principal. Id. The Court concluded that the school district's policy restricting access to the mailboxes was reasonable. Id. The policy preserved the property for its intended purpose, communication with teachers, while preventing the mail system "from becoming a battlefield for inter-union squabbles." Id. at 52.

In this case, as in *Perry*, the teacher's mailboxes fall under the category of a non-public forum.[2] Therefore, the Court must determine whether the District's policy regarding the mailboxes is reasonable in light of the purpose served by the forum, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 806 (1985), and is not discriminate based on viewpoint. *Good News Club v. Milford Central Sch.*, 533 U.S. 98, 106 (2001).

The Administrative Manual for teachers at Tenafly High School sets forth that the mailboxes are the property of the Tenafly Board of Education and should be used for school business. (Thibault Aff., Ex. C). The Manual further states that "any staff member wishing to distribute flyer/announcements, etc. (via

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[2] Although Plaintiff claims that the mailboxes are a limited public forum, limited public forums and non-public forums are subject to the same level of scrutiny.

the mailboxes) must have prior approval from the principal or vice-principal." (Id.).

The Court finds that this policy is reasonable in light of the purpose of the mailboxes, that is to allow the administration to communicate with the teachers. Moreover, the policy is necessary in order to make sure the teacher' mailboxes do not become inundated with flyers and announcements not related to school business that could interfere with the teachers' ability to receive important announcements from the school administration. Finally, the policy is viewpoint neutral.

Pursuant to the contract between the Tenafly Board of Education and the Tenafly Education Association (the "union"), the union has "the right to make reasonable use of the interschool mail system for distribution of Association material provided that this does not interfere with school operations. The building Principal shall be made aware of such use." (Thibault Aff., Ex. D). The contract permits the union to communicate with their members as long as the school principal is on notice of such use. However, Policastro is not the union, he is a teacher. In order to use the mailboxes, he was required to secure permission from the school principal. Furthermore, Policastro could have used other means of communication such as U.S. mail, in person, via telephone, etc. to communicate with the other teachers. The fact that the teacher mailboxes may have been the most effective means of communication does not mean that unrestricted access is required by the First Amendment. See *Cornelius*, 473 U.S. at 809.

Accepting all of Policastro's facts as true, he cannot establish a violation of his First Amendment rights. The teachers' mailboxes are non-public forums, and use can be regulated or restricted as long as it is viewpoint neutral and reasonably related to the forum. In this case, the policy requiring teachers to obtain permission from the school principal before using the mailboxes is both reasonable and viewpoint neutral. Therefore, for the reasons discussed above, the Court grants Defendants' motion to dismiss the complaint for failure to state a claim. An appropriate order follows.

Dated: June 8, 2004

/S/ JOEL A. PISANO, U.S.D.J

APPENDIX E

Questions for the Tenafly Negotiation Team 3/8/02[1]

Tenafly Schools boasts high levels of success for its student populations, as indicated by all statistical review of State and National testing results as well as other educational markers. We, the staff of the Tenafly Schools, have much to do with this success.

The efforts of the negotiations team are much appreciated. Still, we feel the following questions must be addressed:

1. Why haven't staff members been given salary guides of other districts as a basis of comparison? We feel this is crucial, given the steady decline in our salaries over the past three contracts. Do we not deserve parity with neighboring and/or comparable districts?

2. Why have there been virtually no informational meetings or other feedback (written correspondence) pertaining to the status of negotiations?

3. Why are we being given only one (1) day to review the proposed salary guide before ratifying the contract? At a meeting with TEA negotiation members

[1] The memo, dated 3/8/02, was placed in the teacher mailboxes on 3/13/02.

in February, a teacher asked for at least two (2) weeks to review the proposed guide. There were no objections to this from anyone in attendance, yet we get one day to study our possible salaries. Why?

4. Why were no other contractual issues except salary brought to the negotiations table? Building representatives asked members for their contractual concerns and suggestions. These concerns seem to have been ignored. Why?

5. What was the negotiating team's original proposal to the Board?

Respectfully submitted,

/s/ Andrew Policastro and 12 other Tenafly High School teachers.

APPENDIX F

TENAFLY HIGH SCHOOL
TENAFLY, NEW JERSEY

MEMORANDUM

DATE: March 25, 2002
TO: Mr. Howard Glaser, TEA
FROM: Dr. Dora P. Kontogiannis

As per our conversation on March 14, 2002, we discussed two issues that addressed the teachers' mailroom. It was brought to my attention on Wednesday, March 13 that a flyer was placed in the teachers' mailboxes without administrative permission.

The administration removed the flyers from the teachers' mailboxes. Within ten minutes, I was, once again, informed that the flyers were placed in the teachers' mailboxes. At that time a decision was made to close and lock the mailroom to prevent further disruption in the building.

Please be reminded, in the future, anyone wishing to place information in teachers' mailboxes must first obtain administrative permission.

DPK:aq

APPENDIX G

From: Art Thibault [xxxx@xxxx][1]
Sent: Thursday, April 28, 2005 9:58 AM
To: 'Andrew Policastro'
Subject: RE: Local Rule 8.1

Mr. Policastro,

I acknowledge receipt of your statement of damages and will accept same as compliance with Local Rule 8.1.

Arthur R. Thibault Jr., Esq.
APRUZZESE, McDERMOTT,
MASTRO & MURPHY, P.C.
25 Independence Blvd.
P.O. Box 112
Liberty Corner, New Jersey 07938
(xxx) xxx-xxxx
(xxx) xxx-xxxx (fax)
xxxx@xxxx

-----Original Message-----
From: Andrew Policastro
[mailto:apolicastro@optonline.net]
Sent: Wednesday, April 27, 2005 4:11 PM

[1] I intentionally blocked Mr. Thibault's email address and phone number for his privacy.

To: xxxx@xxxx
Cc: apolicastro@optonline.net
Subject: Local Rule 8.1

Mr. Thibault,
Would your please reply back to this email if accepting that I have complied with your "Demand for Statement of Damages".

Besides all demands asked for in my original complaint, demands 11-15, I ask for $10,000,000 (Ten million dollars) as the amount of damages claimed in this action.

Andrew Policastro

APPENDIX H

Excerpt of June 30, 2005 Hearing
before Judge Pisano
Asking for Ten Million Dollars in Damages

* * *

THE COURT: I understand all of that. You'll have a chance to raise all of that.

Is there any claim for damages here? Are you making any claim for monetary damages? What is the relief you seek?

MR. POLICASTRO: In the compiaint I have none.

Tenafly responded with, I forget what the letter said, and I asked for ten million back for my --

THE COURT: You asked for what?

MR. POLICASTRO: Ten million.

THE COURT: $10 million?

MR. POLICASTRO: I asked for that so the lawsuit wouldn't stop.[1]

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[1] I did not know how to ask for one dollar in nominal damages. I thought that if I asked for $1 and Tenafly sent me a check for $1

THE COURT: Is that in the complaint?

MR. POLICASTRO: No. I'm asking for nothing in the complaint.

THE COURT: All you want is injunctive relief?

MR. POLICASTRO: That's correct.

* * *

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the lawsuit would be over. That is why I asked for Ten million. The excerpt is from pages 11-12 of the transcript.

APPENDIX I

From: Larry Tribe [xxxx@xxxx][1]
Sent: Friday, August 12, 2005 1:37 PM
To: apolicastro@optonline.net
Cc: 'Amy Porter';'Kathy McGillicuddy'
Subject: Policastro v. Principal of Tenafly High School and Tenafly Board of Education
Attachments: JANCASE.pdf; POLICASTRO TRIAL BRIEF.pdf

Mr. Andrew Policastro
Tenafly High School

Dear Mr. Policastro:

I have read the Third Circuit opinion reversing the district court's decision to dismiss your complaint; holding that you had indeed stated a cause of action for a violation of your First Amendment rights under the *Tinker* standard; essentially accepting the analysis put forward quite ably in your trial brief, which I have also read; and accordingly remanding the case for trial under the appropriate constitutional standard.

Given the interlocutory posture of the proceedings, there is clearly no plausible basis for the defendants to seek further judicial review at this point, either in the

[1] I intentionally blocked Prof. Tribe's email address, address and phone number for his privacy.

Third Circuit en banc or in the U.S. Supreme Court, much as they might wish to avoid a trial altogether. And there is of course no reason you could possibly want to complain of your own victory in the Third Circuit. So you must be seeking not appellate assistance, which is the only kind of assistance I ever provide (and then usually only in the U.S. Supreme Court), but assistance in conducting the trial against the school principal and the board of education, which is completely beyond the reach of my practice.

With best wishes,

Laurence Tribe

Laurence H. Tribe
Carl M. Loeb University Professor
Harvard University
xxxx
Cambridge, Massachusetts xxxxx
Office: xxx-xxx-xxxx

APPENDIX J

From: Eugene Gressman [xxxx@xxxx][1]
Sent: Friday, September 09, 2005 12:28 PM
To: apolicastro@optonline.net
Subject: Teacher Tinker case

I am shocked to think that neither the ACLU nor the techers union would offer you any help in your case. And I must say you did a bang-up job in writing your trial court brief. Are you sure you are not a lawyer?

Anyway, since you are facing a trial on the merits, I find two critical factors that should be added to your case.

1. A copy of the memo, signed by 13 teachers, that was placed in the teacher mailboxes and then removed by the principal.

2. Some description, either through your testimony or by some written paper, telling us what inspired your memo. Was there some scheduled meeting of the authorities to consider or ratify a new contract for the teachers, including whatever inspired your memo? Had there been other papers in the mailboxes telling the teachers about some upcoming meeting of the authorities and inviting any teacher comments? Was

[1] I intentionally blocked Prof. Gressman's email address for his privacy.

this a meeting of the school board in which the interests of the teachers would be expressed by the teacher's union? Were increased salaries an item to be discussed at this meeting? Did the principal say that he would represent all the interests of the teachers, and did he invite any teacher comments about the prospective meeting? You say that the meeting was called to "ratify" the new contract, but had the teachers been heard from in the earlier stages of developing the contract?

In short, build a record as to what this meeting was about and whether you teachers were expected to, or forbidden to, express any views. Or were you bound or limited by what the teachers union proposed to say at this meeting about ratification? What was it that the principal feared might happen if your memo went forward through the mailboxes to the teachers only? Was this meeting open to the public, including newspaper reporters? Finally, do you know why the union and the ACLU refused to represent you in this legal proceeding?

In short, I think it critical to your case that you explain or submit a copy of the excluded memo. Good luck.

Prof. Emeritus Eugene Gressman

APPENDIX K

From: Policastro, Andrew
Sent: Monday, October 01, 2007 11:08 AM
To: Sherman, Morton; Mackay Staff; Maugham Staff; Smith Staff; Stillman Staff; Middle School Staff; High School Staff; Central Office Staff
Cc: 'Don Kaplan'; 'Janice Jacobs'; 'Jon Teall'; 'Julie Segal'; 'Mark Aronson'; 'Phyllis Kesslen'; 'Richard Press'; 'Rick Fooshee'; 'Virginia Pirie'
Subject: RE: student management system

Dr. Sherman,

You email states, "So, how do we move ahead? We are now involved with a management system that is making many folks unhappy as it is perceived to not meet our needs, is cumbersome, and some have said a step back for us."

I suggest that we move ahead by asking an outside group or the Bergen County Commissioner of Education to investigate the Cimple fiasco.

You wrote briefly about the 1999 appeal to the NY Commissioner of Education (Decision No. 14, 274 – December 21, 1999) and that the appeal was denied.

The following powerful quotes from the appeal, which I am sure you read before Tenafly approved their Cimple contract, reinforce the need for an outside inquiry-

"Although I am constrained to dismiss the Cimple contract claim as untimely, I am deeply disturbed that a contract in excess of one-half million dollars was signed without review by the district's attorney and apparently without formal authorization by the board, that the district contracted to pay a pre-performance installment of $195,000, approximately 35% of the entire contract, with no justification for such advance payment provided in the record, and that such fiscal practices were justified by the board on the basis of a purported need to put these services in place as soon as possible.

Although respondents assert that Dr. Sherman was authorized to "sign" the contract on the board's behalf, respondents provide no evidence of such authority or the means by which such authority was delegated to Dr. Sherman.

Respondents also provide no proof that the board actually performed its duty to evaluate the three proposals and determined that the Cimple proposal would be in the taxpayers' best interests, as required by General Municipal Law §104-b, prior to execution of the contract. Respondents similarly provide no evidence that the board or superintendent conducted sufficient inquiry to assure that Cimple was capable of performing the contract (Appeal of Brau Bus Corporation, 22 Ed Dept Rep 76, Decision No. 10,886)."

The appeal also states, "Cimple breached its obligations under the contract, and on February 11, 1998 the district terminated the contract and demanded the return of $97,500, plus an additional $48,750 for inadequate performance. The record

indicates that Cimple had not repaid any of the money, and the district was contemplating suit against Cimple, as of the date of respondents' answer."

Frank Romano, our former Technology Director is now Assistant Superintendent in Milburn. You have now appointed Dr. Kontogiannis chair of the of the Cimple Task force. Mr. Romano and Dr. Kontogiannis are personal friends, she was also on his dissertation committee. Out of the over 600 school districts in NJ, Dr. Kontogiannis' daughter just got her first teaching position in Milburn.

I have no doubt that Dr. Kontogiannis can lead the task force to investigate Cimple, but this appointment does not pass the "smell test".

We need an outside group to investigate.

Andrew Policastro

From: Sherman, Morton
Sent: Friday, September 28, 2007 12:58 PM
To: Mackay Staff; Maugham Staff; Smith Staff; Stillman Staff; Middle School Staff; High School Staff; Central Office Staff
Cc: Don Kaplan; Janice Jacobs; Jon Teall; Julie Segal; Mark Aronson; Phyllis Kesslen; Richard Press; Rick Fooshee; Virginia Pirie
Subject: student management system

To: All Tenafly Staff
From: Mort Sherman
Re: New Student Management System

Date: September 28, 2007

Most of you know that we implemented a new student management system, Cimple, during the summer.

All of us had hoped that the transition to the new system would be easy, seamless, and quick. This has not been the case so far.

The history of how we came to this point is clear. The question of what we do now is not so easily answered.

During the 2006-07 school year, we were advised that SASI, our student management system in place at that time, was not going to be continued to be supported or upgraded at some point down the line. In a proactive and positive manner, our previous Asst. to the Supt for Curriculum, Instruction, Assessment, and Technology began looking at systems which would support our scheduling, attendance, discipline, progress and report cards, transcripts, and other student management needs, as well as include a data management system that could be tied into the student records. Our previous system did not have that connection.

The intent was a very good one. We wanted to be proactive as we offered connected, easy to use, and professional systems to all of our staff. Our goals continue as they were last winter and spring.

The process in reviewing available management systems included administrators and staff members. As early as last February and March, our Asst. to the Supt for Curriculum, I, A,.and Technology met with administrators and offered opportunities

through them to staff to review what was being proposed as a new student management system. Recent concerns have indicated that the process should have been more inclusive and should have looked deeper at the systems.

However, now that we have had some experience with Cimple, substantive questions have been raised which must be addressed.

One of the questions is whether we can go back to the old system. As we do research on this, we find that SASI is still in the same place it was last year... being phased out.

Another question is whether we must keep the present system long term or can we begin a search for a new student management system. The Cimple contract we have guarantees that the company will meet the unique needs of our district or will give a 100% refund at the end of the year.

A third question which has recently come up is about my prior involvement with Cimple. There was an appeal to the NY Commissioner's office in 1999 (appeal denied) two years after I left S. Orangetown, NY, as superintendent. The claim was that the business procedures did not follow standard practices in creating a contract with Cimple. The conclusion was that there was little or no basis for the claims, although the business manager of that district did not stay. Because the system was implemented as I was leaving, I had no direct experience with the performance of Cimple in that district. When asked last year about the N.Y.S. Ccommissioner's appeal, my

answer was then as it would be now: let's find the best system for our district. I thought about not allowing consideration of Cimple; however, the review of the product was very positive.

So, how do we move ahead? We are now involved with a management system that is making many folks unhappy as it is perceived to not meet our needs, is cumbersome, and some have said a step back for us. There are also some positives. One suggestion which has been made is that we explore other systems options... another suggestion is to work the best we can through this year and then make a decision about the present system under the contract which guarantees success and satisfaction. If we think of this in a way similar to the Lemon Laws protecting owners of cars, we know that certain procedures and timetables have to be followed. However, as we are following those procedures and timetables, we are also looking at other options and talking to other districts.

Perhaps the best course for us right now is to create a task force of teachers, secretaries, and administrators who will work with Michael Ulshoefer (our new Technology Coordinator) and Wayne Demikoff (Business Administrator) to combine both suggestions from above: look at other systems as we continue through this year to make a final determination under the existing contract.

The task force will be chaired by Dr. Dora Kontogiannis, our high school principal. It is most important that those who actually use the systems be part of these reviews and final recommendations. I would like to convene this task force within the next

several weeks. The task force will meet regularly throughout the year (the schedule can be determined by the members) until recommendations are made. If you are interested in being part of this task force, please let Dora, Michael, or me know.

Thank you for your patience and professionalism.

Mort Sherman

APPENDIX L

Mr. Andrew Policastro
59 Day Avenue
Tenafly, NJ 07670

October 4, 2007

Dear Mr. Policastro:

Effective immediately, I am suspending your use of the Tenafly network privileges in accordance with Policy 6142.10 "Acceptable Use of Educational Technology."

Your broadcast use of our email system on Monday, October 1, 2007, violated at least two provisions of this policy:

-"...computer networked services are provided exclusively for ...those purposes that relate to job performances."

-"The broadcasting of any message without first seeking authorization from a building or district administrator is not permitted."

The suspension of your privileges or any use of the Tenafly email system or any other parts of our network is until further notice. Student record keeping and other communication needs will be addressed by you in cooperation with your immediate supervisor and other members of the high school administration.

Based on your violation of board policies, I am officially reprimanding you for your conduct. Further violation of board policies may lead to additional disciplinary action.

Sincerely,
/s/
Morton Sherman, Ed.D.
Superintendent of Schools

C: Members, Board of Education
Dr. Dora Kontogiannis
Personnel File

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(2)

SUPREME COURT, U.S.
FILED
JUN 23 2008
OFFICE OF THE CLERK

No. 07-1341

IN THE

Supreme Court of the United States

ANDREW POLICASTRO,

Petitioner,

v.

THEODORA P. KONTOGIANNIS, Principal Tenafly High School; TENAFLY BOARD OF EDUCATION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

ARTHUR R. THIBAULT JR.
APRUZZESE, MCDERMOTT,
MASTRO & MURPHY, P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, NJ 07938
(908) 580-1776

Attorneys for Respondents

216517

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Does the First Amendment allow public school teachers to place a memo (private speech) in the teacher mailboxes?

2. Can a "plain vanilla" memo placed in the teacher mailboxes cause a "material and substantial disruption"?

3. Is a prior approval policy Constitutional (regarding teacher free speech in the teacher mailboxes) without any guidance on denial?

4. Can a pro se First Amendment lawsuit be moot for lack of damages when damages are clearly on the record but not in the original complaint?

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v. Garland Independent School District,
777 F.2d 1046 (1985) *aff'd*,
479 U.S. 801 (1986) 12

Petitioner requests that this Court exercise its discretionary powers and review the Third Circuit Court of Appeals' decision holding that Petitioner's First Amendment free speech claim was moot and that the Tenafly Board of Education's mailbox policy was not constitutionally overbroad facially or as-applied to him. There is no reason, and Petitioner has offered none, to grant certiorari. There is no circuit split on these holdings. The Third Circuit's decision does not conflict with any decision of this Court. Instead, Petitioner seeks to invoke this Court's supervisory power simply because he asserted a First Amendment free speech claim. Petitioner acknowledged during trial at the District Court and before the Third Circuit that he was not seeking damages for the alleged First Amendment free speech violation. Given that Petitioner waived any claim for damages the Third Circuit correctly held that his First Amendment free speech claim was moot. An appellate decision favorable to the Petitioner would not have required any action on the part of Respondents. It would be no more than a "moral victory" for Petitioner. Petitions for certiorari are not granted so that a litigant can obtain an advisory opinion and a "moral victory." Therefore, the petition for certiorari should be denied.

STATEMENT OF THE CASE

This case arises out of Petitioner Andrew Policastro's contention that he has the right, under the freedom of speech provision of the First Amendment of the United States Constitution, to indiscriminately use the teachers' mailboxes at the Tenafly High School to distribute anything he chooses. The First Amendment provides no such right.

Petitioner is a teacher at the Tenafly High School. On March 13, 2002 a memo concerning a private grievance that 13 teachers had with their union was distributed to all staff members through the teachers' mailboxes at Tenafly High School. The memo, entitled "Questions for the Tenafly Negotiations Team" posed questions about the proposed contract and the union's negotiation strategy that the thirteen signatories had for and about the teachers' union negotiating team. Petitioner was one of the 13 teachers to sign the memo distributed. The memo was placed in the teachers' mailboxes at Tenafly High School between 8:15 and 8:30 a.m., during a regular school day. March 13, 2002 also happened to be ratification day of the new collective negotiations agreement between the teachers union and the school board.

The trial record established that the memo had nothing to do with the students or the curriculum at Tenafly High School, but merely set forth 13 teachers' disagreement with the teachers' union negotiating strategy. A maelstrom of discontent ensued among teachers and other staff members, the exact reaction the signers of the document intended, except that it happened during school hours rather than at the union meeting that afternoon. The high school became engulfed in controversy; staff began to discuss the memo, agitated and upset with its contents. Teachers called other teachers and union leaders to complain, some within the high school and some without the high school.

Complaints also were made to the high school principal, Dr. Theodora Kontogiannis, over distribution of the memo. Kontogiannis was informed that the memo was causing an "alarming amount of discussion" which was disrupting the normal academic flow in the library and elsewhere while students waited to be accommodated by the teaching staff. Alarmed by the atmosphere that this memo had created in her school and desirous to return the employees to their task at hand, i.e. education of students, Dr. Kontogiannis removed the memo from the mailboxes and locked the mailroom door until the end of the school day.

Policastro, as one of the signers of the memo, contended that his right to free speech was violated by Dr. Kontogiannis' actions. He also complained that the Tenafly Board of Education's policy regulating the use of the mailboxes by its employees was overbroad and therefore violative of the First Amendment.

Following a one day bench trial, District Court Judge Joel A. Pisano found that the actions of Dr. Kontogiannis were reasonable and constitutionally permissible based on the facts of the case and concluded that a disruption had occurred at the high school that morning which threatened to interfere with school operations. Further, Judge Pisano concluded that the policy regulating personal use of the mailboxes by the Board's employees was reasonable. Therefore, he entered judgment in favor of the Respondents.

The Third Circuit affirmed the District Court, finding that the mailbox policy was not overbroad, holding

> We agree that the record fails to show that the Mailbox Policy has had an actual or potential chilling effect on teacher speech. Policastro admits that "[s]ince the removal of the memo .. use of the mailboxes by teachers for personal messages (memos, notes, cards, etc.) has continued as usual, without prior approval." Policastro brief at 5. Accordingly we will affirm the District Court's denial of Policastro's overbreadth challenge. *Policastro v. Kontogiannis*, 2008 U.S.App. LEXIS 1387, at *6 (3d Cir. Jan. 24, 2008).

The Third Circuit also affirmed dismissal of Petitioner's as-applied challenge to the mailbox policy, finding that there was no evidence that the policy had been applied to Petitioner or that he had suffered any injury as a result of the mailbox policy.

Petitioner's claim that his right to free speech under the First Amendment was violated was also analyzed by the Court of Appeals. Noting that Petitioner did not seek damages but sought declaratory and injunctive relief only, the Third Circuit dismissed the claim as non-justiciable. In this regard, the Court of Appeals noted that injunctive relief was unavailable and that "declaratory relief would amount to no more than an advisory opinion regarding the "wrongfulness" of past conduct." *Id.* at *10 (citing *Green v. Branson*, 108 F.3d 1296, 1299-1300 (10th Cir. 1997)) Thus, the District

Court's holdings on the facial and as-applied challenge to the mailbox policy were affirmed and Petitioner's First Amendment claim was dismissed as moot.

SUMMARY OF ARGUMENT

The central issue presented is whether the Third Circuit was correct to dismiss Petitioner's claim that his First Amendment right to free speech was violated, holding that since damages were not sought, the issue was moot. Yet Petitioner spends little to no time in his Petition addressing this holding. No case law was cited from this Court or any other sister Circuit to demonstrate that the Third Circuit's decision is in conflict with established law. In short, Petitioner fails to show that the Third Circuit's ruling is erroneous in manner to warrant the exercise of this Court's supervisory review powers.

From the earliest time in our country's jurisprudence, this Court has recognized that Article III of the United States Constitution requires that federal courts decide an actual case and controversy between the parties. Federal courts are not empowered to render advisory opinions, speculating on what may happen in the future. While exceptions to this rule have been established, none fits within the facts of this case.

Petitioner also argues that the mailbox policy is overbroad and that he should not have to request permission to distribute personal, non-school business materials through the mailboxes. While Petitioner appears to conflate a vagueness challenge and an overbreadth challenge, the First Amendment does not

entitle Petitioner to arbitrary and unfettered use of Tenafly's teachers' mailboxes. The policy on use of the teachers' mailboxes is reasonable. It does not prohibit speech, but merely ensures that the mailboxes are used for their intended and primary purpose — school business. The Third Circuit correctly ruled that the policy was not overbroad and was a reasonable regulation of the use of a non-public forum.

REASONS FOR DENYING THE PETITION

I. THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT PETITIONER'S FIRST AMENDMENT FREE SPEECH CLAIM WAS MOOT AND NON-JUSTICIABLE IN LIGHT OF PETITIONER'S ACKNOWLEDGMENT THAT HE DOES NOT SEEK DAMAGES

Petitioner spends the majority of his petition citing to First Amendment case law involving the free speech rights of students in public schools and pays little attention to the issue of whether his claimed violation of the First Amendment is justiciable in the first instance. The Third Circuit's holding on the justiciability of Petitioner's First Amendment free speech claim was correct since Petitioner acknowledged at trial, before the Third Circuit, and admits in his Petition that he does not want money from this lawsuit. The Court of Appeals opinion on this issue is in accord with Supreme Court precedent.

This Court has consistently held that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North*

Carolina v. Rice, 404 U.S. 244, 246 (1971). The lack of power to review moot cases derives from the requirement of Article III of the Constitution that there be an actual case and controversy to adjudicate. *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). When relief cannot be afforded to a litigant through the issuance of a judicial opinion, it amounts to no more than an advisory opinion, which the federal courts have long held they will not issue. See *Rice*, supra, at 246.

In the case at bar, Petitioner is seeking what would amount to an advisory opinion from this Court that Respondents' actions over 6 years ago violated the First Amendment. Yet, such an opinion does not require the Respondents to take any action since Petitioner does not seek damages as a redress. The facts of record demonstrate that the removal of the memo on March 13, 2002 was a one-time incident based on the events that transpired that morning at the high school. No memos had ever been removed before that date and none had been removed at the time that matter was tried. In other words, in the absence of a claim for damages for that one incident 6 years ago, which Petitioner does not seek, his claim of a violation of the First Amendment is moot. Quoting this Court, the Third Circuit recognized that "[t]he real value of the judicial pronouncement – what makes it a proper judicial resolution of a 'case or controversy' rather than an advisory opinion – is in the settling of some dispute *which affects the behavior of the defendant toward the plaintiff*." *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (quoting *Hewitt v. Helms*, 482 U.S. 755, 761 (1987)) (emphasis in original).

Petitioner might achieve some moral victory with an advisory opinion, but that moral victory would not require Respondents to take any action to account for the removal of the memo on March 13, 2002. Nor can it be said that the same set of circumstances, incident and conduct might arise in the future, thereby invoking the "capable of repetition, but evading review" exception to the mootness doctrine. Whatever may occur in the future relative to the teachers' mailboxes in Tenafly or elsewhere can be judged and decided on the facts and circumstances of that matter since any inquiry into a violation of the First Amendment is fact-sensitive. *See, e.g., Defunis v. Odegaard*, 416 U.S. 312, 319 (1974). Review of the Third Circuit's holding is unnecessary as it is in accord with established case law and the Petition presents no reason to review the Court of Appeals' mootness determination.

II. THE THIRD CIRCUIT CORRECTLY CONCLUDED THAT TENAFLY'S POLICY, WHICH REGULATES ITS EMPLOYEES' USE OF THE MAILBOXES FOR PERSONAL, NON-SCHOOL RELATED BUSINESS IS NOT OVERBROAD

The Petition contends that the Tenafly mailbox policy is overbroad and should be declared unconstitutional because it requires prior approval from the school building principal before distribution of personal, non-school business items. Petitioner's brief conflates an overbreadth challenge with a vagueness challenge. Nonetheless, the only issue is whether the Third Circuit correctly concluded that the policy was not overbroad on its face or as-applied.

The Tenafly Board of Education's Administrative Manual for Teachers explains that "Mailboxes are the property of the Tenafly Board of Education and should be used for school business." Staff members, including teachers, who wish to distribute "flyers/announcements, etc. (via the mailboxes) must have prior approval from the principal or vice-principal."

An individual may challenge a regulation or policy under the First Amendment overbreadth doctrine, because "[its] very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broderick v. Oklahoma*, 413 U.S. 601, 612 (1973). As the Third Circuit noted in its opinion below, "avoidance of this chilling effect is at the heart of the overbreadth doctrine." *Gasparinetti v. Kerr*, 568 F.2d 311, 317 (3d Cir. 1977). A court must consider that the overbreadth doctrine is "strong medicine" that should be used "sparingly and only as a last resort." *Id.* at 613. In that vein, "a single impermissible application" is insufficient to deem a policy invalid, *New York v. Ferber*, 458 U.S. 747, 772 (1982) (internal quotation marks and citation omitted), and instead, "a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications." *Id.* at 771.

The Tenafly mailbox policy is a reasonable regulation of a non-public forum; thus Tenafly's regulation and control over the use of its mailboxes does not violate the First Amendment. A policy challenged on its face as overbroad must be analyzed dependent on the nature of the forum. Property that is a non-public forum may be reserved by the government for its intended

purposes "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46, 103 S. Ct. 948 (1983). In other words, the restriction on speech must not discriminate based on viewpoint and must be reasonable in light of the purpose served by the forum. *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806 (1985) (holding that prior restraints in nonpublic forums are permissible when reasonable and viewpoint neutral).

The Third Circuit affirmed the District Court's findings that the policy had no actual or potential chilling effect on First Amendment rights. Importantly, the trial record was replete with examples that both before and after the incident on March 13, 2002, teachers, including Petitioner, distributed personal items through the mailboxes. In fact, the record reflects that Petitioner utilized the mailboxes to distribute personal items only one time before March 13, 2002, but two or three times after that date. Petitioner acknowledged to the Third Circuit that teacher use of the mailboxes for personal items continued without prior approval. Thus, Petitioner can hardly argue that the policy or actions of Dr. Kontogiannis "chilled" his First Amendment rights to free speech. That Petitioner does not want to seek permission to distribute personal, non-school business material through the mailboxes does not make Tenafly's policy unconstitutionally overbroad.

Further, the Third Circuit found support in the record for the District Court's conclusions that no one was ever denied permission to use the mailboxes; that

no personal item had ever been removed from the mailboxes but the subject memo; and that, as Dr. Kontogiannis testified, the mailboxes are the primary way in which administration, parents and students communicate with teachers. Thus, the regulation is reasonable in light of the purpose served by the forum. The mailboxes are, unequivocally, for school business. Regulation over what and how much personal, non-school business materials are distributed through the mailboxes is necessary lest the teachers' mailboxes become inundated with flyers, memos, advertisements, personal notes, solicitations of all kinds and other non-school business related documents. It is not difficult to imagine that without some control over what and how much is placed in teacher mailboxes, important announcements from administration officials could go unnoticed or be discarded by teachers as simply junk mail. "[R]estrictions on speech in a non-public forum may be imposed if it is reasonable to anticipate that interference with the [purpose of the forum] *may* occur, even though it has not yet occurred." *Paff v. Kaltenbach*, 204 F.3d 425, 433 (3d Cir. 2000) (emphasis in original). The Tenafly policy ensures that the building principal retains control over the use of teachers' mailboxes so that announcements which need to get to the teaching staff will get to them. The policy on its face is viewpoint neutral and is in accordance with settled law.

Petitioner's advocation for unfettered use of the mailboxes for any purpose so long as the communication is not lewd or vulgar misses the point. In a school environment, such communication can always be prohibited. To provide the access to the mailboxes for which Petitioner urges would turn the mailboxes into a

repository for distribution of every conceivable personal communication, from the sale of personal items to new business opportunities to rental properties available. The possibilities are endless.

When considering the reasonableness of the policy, the Court must recognize that Petitioner has access to alternative channels of speech. Teachers and staff can communicate with one another via U.S. mail, in-person, by telephone, outside the workplace, during non-working time in the school, such as lunch, in teacher offices, faculty rooms or utilize the teacher bulletin board in the attendance office. Unrestricted access to the teachers' mailboxes is not required under the First Amendment merely because it may be the most efficient way of communication with other teachers. *Cornelius*, 473 U.S. at 809 (1985). The First Amendment is not violated by Tenafly's retention of control over a non-public forum. *Perry*, 460 U.S. at 49.

The cases relied on by Petitioner are inapposite to the Tenafly policy. In *Texas State Teachers Assn. v. Garland Independent School District*, 777 F.2d 1046, 1055 (1985) *aff'd*, 479 U.S. 801 (1986), the Fifth Circuit held that a district policy, which permitted teachers to use the internal mail system to communicate with each other for any reason, except for subjects involving employee organizations, was unconstitutional. The Garland policy could not pass a reasonableness standard because it prohibited speech based on content. Tenafly's policy is viewpoint neutral. Likewise, Petitioner's reliance on cases involving public fora is misplaced since the Tenafly's teachers' mailboxes are not equivalent to a public street.

Finally, the Third Circuit affirmed the District Court's finding that Kontogiannis removed the memo on March 13, 2002 because of the disruption with the teachers and the school's operation that morning. The record was devoid of evidence that Kontogiannis relied upon the mailbox policy to support the action she took. As such, there is no evidence that the policy was ever applied to Petitioner or that he was injured by such an application. Thus, there is no compelling reason to review the Third Circuit's holding that the mailbox policy is not overbroad and is not overbroad as applied to Petitioner.

III. PETITIONER'S FIRST AMENDMENT CLAIM DOES NOT PROVIDE A BASIS TO GRANT THE PETITION SINCE THIS CLAIM WAS NEVER ADDRESSED BY THE THIRD CIRCUIT

Although the Petitioner devotes the majority of his petition to the claim that his First Amendment rights were violated when the memo was removed from the mailboxes, the Third Circuit Court of Appeals did not reach this issue since it found Petitioner's claim moot. Therefore, Respondents will not address an issue that was not addressed by the Court of Appeals.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

ARTHUR R. THIBAULT JR.
APRUZZESE, MCDERMOTT,
MASTRO & MURPHY, P.C.
25 Independence Boulevard
P.O. Box 112
Liberty Corner, NJ 07938
(908) 580-1776

Attorneys for Respondents

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(3)

No. 07-1341

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SUPREME COURT, U.S.

In The
Supreme Court of the United States

ANDREW POLICASTRO,
Petitioner,

v.

DR. THEODORA P. KONTOGIANNIS, Principal Tenafly High School; TENAFLY BOARD OF EDUCATION,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

ANDREW POLICASTRO
59 DAY AVENUE
TENAFLY, NJ 07670
(201) 568-0387

Petitioner Pro Se

August 14, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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DISRUPTION

"There wasn't anything offensive, vulgar or unreasonable about the content of the memorandum." (Judge Pisano, Tr. 160:9).

Tenafly's brief (p. 13) fleetingly mentions the heart of their defense: the so called "disruption", "...the disruption with the teachers and the school's operation that morning." Since the memo of this case does not reach the high *Tinker* standard of "material and substantial disruption" the Third Circuit has overturned *Tinker*.

The trial transcript, common sense and the memo itself reveal what any fact finder would find: there was no "material and substantial disruption." While Tenafly's brief claims "disruption"; *Tinker* requires "material and substantial disruption." The Third Circuit's 2008 opinion egregiously ignored *Tinker* in spite of the fact that *Tinker* was the basis of my legal victory in 2005.

"...[T]eachers were out of their classrooms discussing the contents of the memo in the hallways, in the library...". (Judge Pisano's ruling, Tr. 204:11). Two secretaries in the library were talking about the memo and a student had to wait a minute for assistance. This "material and substantial disruption" claimed by Tenafly defies logic. Tenafly's case crumbles.

In Tenafly High School teachers routinely spend half of the day out of the classroom because of our normal teaching schedule. The image of teachers in

their classrooms all day is correct only for elementary schools.

Therefore, Judge Pisano's ruling is baseless because it claims teachers discussing the memo left classrooms unattended, and that absolutely did not happen. During Oral Argument before the Third Circuit Tenafly's counsel admitted there was not any evidence of teachers leaving their classrooms with students inside.

From the Third Circuit Oral Argument (1-23-07):

> 20 minutes: 38 seconds-
> Tenafly: "We submit that teachers outside their classrooms. That is a disruption." (How so? Most high school teachers are assigned classrooms 50 percent of the day. This is completely normal and not at all disruptive.)
>
> 20 minutes: 55 seconds-
> Judge Fuentes: "Was there any evidence that any of the teachers left classrooms with students inside unattended?"
>
> Tenafly: "There was none on the record or testimony to that. None at all."

In light of this exchange between Circuit Judge Fuentes and Tenafly's counsel Judge Pisano's ruling that "[T]eachers were out of their classrooms discussing the contents of the memo in the hallways" is in error. In no instance were students left unattended. From the trial: Kontogiannis (Principal): "...I heard from many people within an hour that they

were either offended by it or they were outside the classrooms discussing this. I can't prove it, that was just told to me, okay". (Tr. 138:22).

I questioned the principal about teachers leaving their students during class instruction (Tr. 141-142) and she stated, "I was told that, yes. I can't prove that, that's what I was told." (Tr. 142:2). I then asked, "What discipline, if any, occurred to the teachers who left their students unattended to complain about the memo?" (Tr. 142:4). The principal testified, "I did not follow-up on that." (Tr. 142:9). I pressed this issue because teachers leaving their classes during instructional time is conduct unbecoming. The principal testified she did not follow up on conduct unbecoming (teachers leaving students unattended), but she did follow up that two teachers were offended by the "plain vanilla" memo in the mailbox that asked five questions, including, "(5) What was the negotiating team's original proposal to the Board?" App. 51a. There was no disruption at all, and there unequivocally was no "material and substantial disruption."

The principal's interrogatories (August 25, 2005- over 4 months before the trial) confirm that students were not left unattended:

> 10. What discipline, if any, occurred to the teachers who left their students unattended to complain about the memo?
>
> Response: ...Defendant answers that she is unaware of any teacher having left students unattended and, therefore, no one was disciplined.

(I submitted the principal's interrogatories as exhibits 127-132 in District Court and as appendix A-15 to A-20 before the Third Circuit).

Dr. Kontogiannis stated, "There's nothing in this memo that I find inappropriate." (Tr. 139:5). The memo was removed, then, because a few teachers did not agree with the memo.

How could the "plain vanilla" memo cause a "material and substantial disruption"? It could not and did not. As a matter of law the memo did not reach the high *Tinker* standard. Two teachers complained to the principal about the memo? These same two teachers testified that they never complained; they only discussed the memo with the principal. (Tr. 56-59; 88-92). Two secretaries in the library were chatting about the memo while a student had to wait a minute to take out a book? Is that what it takes to reach the *Tinker* standard in the Third Circuit?

The principal's interrogatories listed many teachers who supposedly complained to her about the memo. However, in blatant contradiction, teachers listed (interrogatories) as complainers testified that they never complained to the principal about the memo. (Tr. 58:4; 84:5; 89:17; 106:22-107:9).

Saxe at 212, "Noting that the only evidence was the objection of several other students[teachers], the court observed that "[I]f school officials were permitted to prohibit expression to which other students[teachers] objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression." *Saxe v. State College*, 240 F.3d 200,

(Justice Alito, 3rd Cir. 2001). This is exactly what happened in this case!

Tenafly's brief (p. 2), "A maelstrom of discontent ensued..." and "the high school became engulfed in controversy..." This is pure fiction. Where is Tenafly's evidence to back up this hyperbole? "...[T]he exact reaction the signers of the document intended..." is an especially offensive misstatement and clear speculation without any substantiation in the record. The record reveals quite the opposite on direct examination by me of the teacher who placed the memo in the mailboxes twice that morning:

> Q. "Mr. Golde, why did you place the memos in the teacher mailboxes?"
>
> A. "Because I was among 13 people, I believe, who signed this, who felt that there were important issues that the negotiation team needed to address and that all staff members would want to hear the response of the negotiation team to those issues." (Tr. 36:21).

Tenafly's brief (p.3), "...the memo...was disrupting the normal academic flow in the library and elsewhere while students waited to be accommodated by the teaching staff." The library is not a classroom; there is no normal academic flow. It is a library and two secretaries were chatting about the memo. So what? What if they were talking about the weather? "[E]lsewhere? What does elsewhere mean? Where is the evidence? Tenafly is required to reference these facts and they did not because they cannot. "[T]eaching staff? What teaching staff? The trial revealed one

student waited a minute for assistance in the library from the secretaries. Significantly, the trial testimony revealed the library is completely closed all day many times a year for events and meetings. (Tr. 169:11). "But the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students[secretaries, teachers]." *Bd. of Ed., Island Trees Union Sch. Dist. v. Pico*, 457 U.S. 853, 868 (1982).

"The *Tinker* test comes from *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), which held that teacher communications may be suppressed only when "the expression or its method of exercise materially and substantially interferes with the activities or discipline of the school." *Id.*" *Texas State Teach. Assn. v. Garland Indep. Sch. Dist.*, 777 F.2d 1046, 1053 (5th Cir. 1985), aff'd, 479 U.S. 801 (1986).

This is the *Tinker* test and it was affirmed by this Court in 1986. Let us examine "the expression or its method of exercise" logically: if A or B then C.

A = The expression materially and substantially interferes with the activities or discipline of the school.
B = The method of exercise materially and substantially interferes with the activities or discipline of the school.
C = Teacher communications may be suppressed.

The expression (A) was the memo; the method of exercise (B) was placing the memos in the teacher

mailboxes. Because there could not be a milder method of exercise (B) in a high school than a teacher placing memos in teacher mailboxes we only have to consider A.

The first Third Circuit panel (Jan. 2005) opined, "The memo contained five questions regarding the negotiation of the Tenafly teachers' contract...The Memo does not contain lewd or vulgar statements". App. 36a.

The District Court stated, "There wasn't anything offensive, vulgar or unreasonable about the content of the memorandum." (Tr. 160:9). The court also described the memo as "plain vanilla" during the bench ruling. (Tr. 209:12), App. 27a.

The principal stated,

> (1) "...I don't think there's anything in here[the memo] that is obscene or vulgar..." (Tr. 135:23);
> (2) "I don't see anything in here[the memo] personally that I'm offended by..." (Tr. 136:5);
> (3) "There's nothing in this memo that I find inappropriate." (Tr. 139:5).

The recent Third Circuit panel (Jan. 2008) used "plain vanilla". App. 2a.

Taking all of these statements as true, to paraphrase:

> the expression (A) of this case was reasonable and appropriate and not lewd, not vulgar and

not offensive. The expression (A) was "plain vanilla".

Reasonable, appropriate and "plain vanilla" expression (A) cannot materially and substantially interfere with the activities or discipline of the school.

Conclusion: Under the *Tinker* test the memo may not be suppressed.

This analysis was affirmed by the Supreme Court in 1986. The first Third Circuit panel (2005) agreed and concluded, "Thus, the speech would fall under the *Tinker* rule, whereby Tenafly can only regulate the speech if it would "substantially disrupt school operations or interfere with the right of others." *Saxe,* 240 F.3d at 214." App. 37a.

Tenafly argued in District Court and on appeal that the memo caused disruption; while any real analysis under *Tinker* reveals otherwise. Teacher free speech and the First Amendment have been obliterated!

The Third Circuit's recent opinion egregiously stated, "...arguments among teachers." App. 2a. What arguments? Where did this come from? There were no arguments among teachers mentioned in any brief, any transcript or any prior opinion! I have listened to the oral argument of this case over 5x and there is absolutely no mention of teacher arguments. Where on Earth did this statement come from? The statement, "...arguments among teachers" is fiction. There never was a "material and substantial disruption" and now the Third Circuit is imagining facts that never existed!

I discussed "arguments among teachers" in my petition (p. 35). Besides the compliments Prof. Gressman gave to me on page 59a in my petition, his book emphasizes, "The opposition must identify any misstatement of fact or law in the petition or risk waiver". *Supreme Court Practice*, Gressman et al., p. 495, (2007). Gressman reinforces Supreme Court rule 15.2., "...the brief in opposition should address any perceived misstatement of fact or law in the petition...". *Id.* at 496. Tenafly could not and did not refute that there were never "arguments among teachers". Tenafly loses credibility by not admitting the fiction of "arguments among teachers." Tenafly's credibility implodes regarding mootness, as well.

MOOTNESS

Tenafly's brief (p. 5), "...holding that since damages were not sought, the issue was moot". Tenafly clearly acknowledged and witnessed in District Court that I absolutely and unequivocally asked for damages. This case is not about money; I asked for damages only so the case would proceed. I replied to the mootness theory. (Petition 34-35, App. 53a-56a). Let me respond, contrary to Tenafly's brief, with facts and actual references.

1. My April 27, 2005 email to Tenafly's counsel stated, "Would you please reply back to this email if accepting that I have complied with your "Demand for Statement of Damages." Besides all demands asked for in my original complaint, demands 11-15, I ask for $10,000,000 (Ten million dollars) as the amount of damages claimed in this action." App. 53a-54a.

Tenafly's counsel April 28, 2005 reply email stated, "I acknowledge receipt of your statement of damages and will accept same as compliance with local rule 8.1." App. 53a.

I never coveted money via this lawsuit; that was true in 2005 and it is still true today. This lawsuit is not about money, this case is about the First Amendment rights of teachers. This case is *Tinker* for teachers, plain and simple.

2. District Court on June 30, 2005, "Is there any claim for damages here? Are you making any claim for monetary damages? What is the relief you seek?" I replied, "In the complaint I have none. Tenafly responded with, I forget what the letter said, and I asked for ten million back for my--" "You asked for what?" "Ten million." "$10 million?" "I asked for that so the lawsuit wouldn't stop." "Is that in the complaint?" "No, I'm asking for nothing in the complaint." "All you want is injunctive relief?" "That's correct." App. 55a-56a.

As a pro se plaintiff I did not know how to ask for one dollar in nominal damages. I thought that if I asked for $1 and Tenafly sent me a check for $1 the lawsuit would be over. That is why I asked for Ten million. App. 55a-56a.

3. Settlement hearing, August 1, 2005 (p. 5:13, in chambers and on the record):

> THE COURT: "That being said, I asked you a question, Mr. Policastro, after we argued the motion for summary judgment, which is what your

damages are. And you made a demand, as I recall it, of some millions of dollars to settle the case. I'd like you to articulate some rational basis, in fact, for that sort of a demand in this case."

MR. POLICASTRO: "That was the Rule 8(1) -- I forget what the rules are."

THE COURT: "Why don't you put the rules aside. You're not a lawyer, I'm not going to hold you to rules. Your pleadings will be given a more liberal treatment because you're not a lawyer."

How ironic! Judge Pisano in August, 2005 stating, "I'm not going to hold you to rules." While the Third Circuit certainly tried! This case is not moot and has never been moot. This case is not about money, I only asked for money to keep the case from ending. $1 in nominal damages is fine with me. Judge Pisano could have easily converted the $10,000,000 to $1 in nominal damages; it would have been OK with me. It was plain error for the Third Circuit to rule my pro se case was moot in January, 2008. It was actually egregious error by the Third Circuit because the mootness claim was never briefed by either party before the Third Circuit and mootness was never discussed at Oral Argument in January, 2007.

Tenafly's brief (p. 1), "Given that Petitioner waived any claim for damages the Third Circuit correctly held that his First Amendment free speech claim was moot." This is an egregious misstatement by Tenafly. I never waived any claim for damages. I never waived any claim for damages in District Court or in my 7 minutes (Oral Argument) before the Third Circuit.

OVERBREADTH

Tenafly's brief (p. 8), states I am conflated about overbreadth. I handled the overbreadth issue squarely in my petition (p. 34). The Tenafly teacher mailbox policy is unconstitutional if teacher mailboxes are constitutionally protected. *Perry* is clear that teacher mailboxes are constitutionally protected: "The First Amendment's guarantee of free speech applies to teacher's mailboxes as surely as it does elsewhere within the school, *Tinker v. Des Moines School District, supra...*" *Perry Ed. Assoc. v. Perry Local Ed. Assoc.*, 460 U.S. 37, 44 (1983). Thus, the Tenafly teacher (prior approval) mailbox policy is unconstitutional. From *Perry* at 44, quoting *Tinker* at 506, "There is no question that constitutional interests are implicated by denying PLEA[Policastro's memo] use of the interschool mail system[teacher mailboxes]. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate"."

> A statute[teacher mailbox policy] may withstand an overbreadth attack "only if as authoritatively construed..., it is not susceptible of application to speech...that is protected by the First and Fourteenth Amendments." *Goodling v. Wilson*, 405 U.S. 518, 520 (1972). If the ordinance[teacher mailbox policy] applies to appellant's activities[use of teacher mailboxes] and if appellant's activities[use of teacher mailboxes] are constitutionally protected, then the ordinance[teacher mailbox policy] is overly broad, and thus, unconstitutional. *Grayned v. City of Rockford,* 408 U.S. 104, 124 (1972).

Thus, the Tenafly mailbox policy is unconstitutional.

FROZEN SPEECH

Tenafly's brief (p. 10), "Thus, Petitioner can hardly argue that the policy or actions of Dr. Kontogiannis "chilled" his First Amendment rights to free speech". My speech is not merely chilled at Tenafly, it is frozen. Two months after the memos were removed I had a meeting with the principal about what happened. At "[t]he end of the meeting, Dr. K reinforced that prior approval must be had before placing items in the teacher mailboxes." (Tr. 184:16). Tenafly's brief (p. 4) and the Third Circuit misinterpreted, "use of the mailboxes...has continued as usual". Other teachers' use of the mailboxes has continued as usual, but not my use. During the meeting (May, 2002) the principal gave me a verbal directive, witnessed by two staff members, "that prior approval must be had". The principal's removal of the memo (March, 2002), her verbal directive (May, 2002), and subsequent court decisions of my case (2004, 2006, 2008) have absolutely chilled my Constitutional right to free speech in the teacher mailboxes.

Considering Tenafly's recent major disciplinary action against me suspending my use of school email (teacher free speech), based on the school mailbox/school email policy, my speech is now effectively frozen. (Petition 2-3, App. 61a-69a).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. Expedited briefing is requested.

Respectfully submitted,

Andrew Policastro
Pro Se
59 Day Avenue
Tenafly, NJ 07670
(201) 568-0387